PETITION FOR WRIT OF CERTIORARI

FILED

No. 09- 09-167 AUG 10 2009

OFFICE OF THE CLERK
William K. Suter, Clerk

In The
Supreme Court of the United States

RICHARD M. SCRUSHY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

JAMES K. JENKINS
MALOY JENKINS PARKER
75 Fourteenth Street, NW
25th Floor
Atlanta, GA 30309
(404) 875-2700

BRUCE S. ROGOW
Counsel of Record
BRUCE S. ROGOW, P.A.
500 East Broward Blvd., Suite 1930
Fort Lauderdale, FL 33394
(954) 767-8909

Counsel for Petitioner

QUESTIONS PRESENTED

I. Does the *McCormick v. United States*, 500 U.S. 257, 273 (1991), holding that campaign contributions cannot constitute bribery unless "the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act" mean what it says, or may a conviction be obtained by implying or inferring that such a promise occurred?

II. Did *Evans v. United States*, 504 U.S. 255 (1992), which was not a campaign contribution case, modify the *McCormick v. United States* "explicit promise" requirement?

TABLE OF CONTENTS

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE AND FACTS 4

A. The Procedural History, Charges, Conviction and Sentence 4

B. The Facts 7

REASONS FOR GRANTING THE PETITION 9

I. THE DECISION BELOW CONFLICTS WITH *McCORMICK v. UNITED STATES*, MISUSES *EVANS v. UNITED STATES*, AND PRESENTS THE IMPORTANT QUESTION OF THE PRECISE PROOF REQUIREMENT IN AN ISSUE RELATED CAMPAIGN CONTRIBUTION BRIBERY CASE. 10

II. CONFUSION AND CONFLICT IN THE CIRCUITS ABOUT THE IMPACT OF *EVANS* ON *McCORMICK'S* "EXPLICIT PROMISE" REQUIREMENT IS ANOTHER REASON FOR GRANTING REVIEW 13

CONCLUSION 18

APPENDIX

Appendix A – Decision of the United States Court of Appeals for the Eleven Circuit 1a-69a

Appendix B – Order Denying Rehearing 70a

TABLE OF AUTHORITIES

CASES

Evans v. United States, 504 U.S. 255 (1992) ..... *passim*

McCormick v. United States, 500 U.S. 257 (1991) .. *passim*

United States v. Abbey, 560 F.3d 513 (6th Cir. 2009) 15

United States v. Blandford, 33 F.3d 685 (6th Cir. 1994) 13-15

United States v. Collins, 78 F.3d 1021 (6th Cir. 1996) ... 15

United States v. Garcia, 992 F.2d 409 (2d Cir. 1993) ... 13

United States v. Kincaid-Chauncey, 556 F.3d 923 (9th Cir. 2009) 15-17

United States v. Martinez, 14 F.3d 543 (11th Cir. 1994) .. 13

United States v. Siegelman, 561 F.3d 1215 (11th Cir. 2009) 1

United States v. Taylor, 993 F.2d 382 (4th Cir. 1993) 13

STATUTES

18 U.S.C. § 371 ..... 2, 4

18 U.S.C. §§ 666(a)(1)(B) & (2) 2, 4

18 U.S.C. § 1341 3-4

18 U.S.C. § 1346 4

28 U.S.C. § 1254(1) 1

OTHER

Webster's Encyclopedic Unabridged Dictionary of the English Language (1996) 12

PETITION FOR A WRIT OF CERTIORARI

Petitioner Richard Scrushy petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit was entered on March 6, 2009. It is reported at 561 F.3d 1215 (11th Cir. 2009). The opinion is reprinted in the Appendix at 1a-69a.

JURISDICTION

The judgment and opinion of the Eleventh Circuit affirming Richard Scrushy's conviction and sentence was entered on March 6, 2009. A timely Petition for Panel Rehearing or for Rehearing *En Banc* was denied on May 14, 2009. App. 70a. This petition for writ of certiorari is filed within 90 days of the May 14, 2009 denial of rehearing and rehearing *en banc*. The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 371
Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. §§ 666(a)(1)(B) & (2)
Theft or bribery concerning programs receiving Federal funds

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more; . . . .

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian

tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more; . . . .

18 U.S.C. § 1341
Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of

the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. §5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1346
Definition of "scheme or artifice to defraud"

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

STATEMENT OF THE CASE AND FACTS

A. The Procedural History, Charges, Conviction and Sentence

In May 2005, Richard Scrushy, Don Siegelman, Paul Hamrick, and Mack Roberts were named in a multi-count sealed indictment. A second superseding indictment was returned in December 2005. Scrushy was named in Counts Three through Nine. Counts Three and Four charged Scrushy and Siegelman with federal funds bribery and aiding and abetting each other, in violation of 18 U.S.C. §§ 666(a)(1)(B) & 2. Count Five charged Scrushy and Siegelman with conspiracy to commit honest services mail fraud, in violation of 18 U.S.C. § 371. Counts Six through Nine charged Scrushy and Siegelman with honest services mail fraud and aiding and abetting each other, in violation of 18 U.S.C. §§ 1341, 1346. Scrushy was not named in the remaining 27 counts of the indictment.

All four Defendants were tried before a jury from May 1, 2006 through June 29, 2006. Prior to deliberations, the court ordered the Government to elect as to multiplicitus Counts Three and Four, and dismissed Count Three as to Scrushy. After eleven days of deliberations, two jury notes indicating inability to reach a verdict on any count, one note indicating problems deliberating, and an *Allen* charge, the jury convicted Scrushy of Counts Four through Nine. Siegelman was convicted of Counts Three, Five through Nine and Seventeen. Roberts and Hamrick were acquitted on all charged counts.

Scrushy filed two motions for new trial based on jury misconduct. After the verdict, counsel for both Scrushy and Siegelman received a series of envelopes by U.S. Mail from an anonymous source or sources. The envelopes contained copies of e-mails between jurors. Six of the e-mails were exchanged between Jurors 7 and 40 and at least two other jurors in the evening hours during the eleven-day jury deliberations. Two of the mid-deliberation e-mails were especially troublesome:

Sunday, June 25, 2006 10:41 PM
from: [e-mail address containing name of Juror 40]
to: [e-mail address containing name of Juror 7]

I can't see anything we miss'd. u?
articles usent outstanding! gov & pastor up s—t creek.
good thing no one likes them anyway. all public officials r scum; especially this 1.
pastor is reall a piece of work
...they missed before, but we won't
...also, keepworking on 30...
will update u on other meeting.
[first name of Juror 40]

Sunday, June 25, 2006 10:47 PM
from: [e-mail address containing first name of Juror 7]
to: [e-mail address containing name of Juror 40]

great info for our friends
% of prosecution increases dramatically.
Could not find that when I surfed it.
Gov/Pastor GONE....

The district court rejected Scrushy's jury misconduct new trial motions, refusing to permit discovery into the authenticity of the e-mails.

The court sentenced Scrushy to 82 months imprisonment, three years supervised release, 500 hours community service, a $150,000 fine, $267,000 restitution, and $600 special assessment. The court immediately remanded Scrushy to custody, and he has been incarcerated since June 28, 2007. Scrushy's motions for release pending appeal were denied by the district court and the court of appeals.

The Eleventh Circuit Court of Appeals affirmed Scrushy's convictions, based upon Justice Kennedy's concurrence in *Evans v. United States* which led the court of appeals to conclude that the jury could imply or infer from the evidence the "explicit promise" required by *McCormick v. United States*. App. 20a, 23a. The court affirmed the district court's decision that the e-mails did not constitute grounds for a new trial. App. 58a-60a.

B. The Facts

The essential facts are that Richard Scrushy had been previously appointed to the Alabama Certificate of Need Board by three former governors. Scrushy had not supported Governor Siegelman in the Alabama gubernatorial election; he had contributed $350,000 to Siegelman's opponent. Siegelman told a lobbyist for Scrushy's company that Scrushy needed to contribute to the education lottery campaign "to make it right." The Government's star witness, Siegelman's aide Nick Bailey, told of a meeting between Scrushy and the Governor, at which Bailey was not present. According to Bailey, Scrushy gave a $250,000 check to the Governor. The following trial colloquy with the Governor's aide was the heart of the prosecution's case:

> Q. [AUSA] Okay. Now, when you saw the Governor, did he have this check in his hand? Did he have it?
>
> A. [Governor's Aide Nick Bailey]: Yes.
>
> Q. Okay. Now, when the Governor showed you the check, what if anything, did he say to you?
>
> A. He made the comment, referring to Mr. Scrushy's commitment to give $500,000, that he's halfway there.
>
> Q. Okay. And what, if anything, did you say to him?

A. I said – I responded by saying, what in the world is he going to want for that? And his response was the CON Board, the C-O-N Board.

Q. Okay. And what did you say?

A. I said, I wouldn't think there would be a problem, would it? And he said, I wouldn't think so.

R36-506-07; App. 22a.

The court below recounted other evidence adduced by the Government to support the notion that there was an explicit *quid pro quo* – that being on the CON Board was important to Scrushy; that some of the donation was made by Scrushy through a company because Scrushy and his wife were against the lottery; that an outside lobbyist for Scrushy's company did not want Scrushy to be "let down" if he made the contribution. App. 6-9; 23-25a. But the Bailey testimony of his colloquy with Governor Siegelman was the Eleventh Circuit's linchpin: "Bailey's testimony was competent evidence that Siegelman and Scrushy had agreed to a deal in which Scrushy's donation would be rewarded with a seat on the CON Board." App. 24a. The court concluded that "[i]nferring actors' states of mind from the circumstances" was "the province of the jury" and specifically relied on Justice Kennedy's concurrence in *Evans v. United States*, "'the [jury] is quite capable of deciding the intent with which words were spoken or actions taken as well as the reasonable construction given to them by the official and the payor." *See Evans*, 504 U.S. at 274 (Kennedy, J., concurring.)'" App. 24a.

There was no direct evidence of the words spoken at any Scrushy/Siegelman conversation; no evidence of any explicit promise; no direct evidence of any Siegelman assertion that his actions would be controlled by a Scrushy donation to the Alabama Education lottery fund. The only direct evidence was that Scrushy gave $500,000 as a campaign contribution to the fund for a lottery for education initiative and that Scrushy was appointed to the CON Board.

And there can be no dispute that the only case law basis for the Eleventh Circuit's affirmance of Scrushy's conviction is Justice Kennedy's concurrence in *Evans*. *Evans* was a non-campaign contribution case where the issue presented to and decided by the Court was whether an affirmative act of inducement by a public official was an element of extortion under color of official right. Here, the issue presented is whether in a campaign contribution case, *Evans* modified *McCormick*.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit recognized the important First Amendment issue presented in this case. The convictions of Scrushy and Governor Siegelman were based on Scrushy's donations to the Alabama Education lottery campaign and the court wrote: "As such, they impact the First Amendment's core values – protection of free political speech and the right to support issues of great public importance . . . . In a political system that is based upon raising private contributions for campaigns for public office and for issue referenda, there is ample opportunity for that error [a conviction upon an improper instruction] to be committed." App. 14a-15a. Against that backdrop we present these reasons for granting review:

I. THE DECISION BELOW CONFLICTS WITH *McCORMICK v. UNITED STATES*, MISUSES *EVANS v. UNITED STATES*, AND PRESENTS THE IMPORTANT QUESTION OF THE PRECISE PROOF REQUIREMENT IN AN ISSUE RELATED CAMPAIGN CONTRIBUTION "BRIBERY" CASE

Addressing campaign contributions to candidates, this Court made clear that such contributions violate the law "only if the payments are made in return for *an explicit promise or undertaking* by the official to perform or not to perform an official act." *McCormick*, 500 U.S. at 273 (emphasis supplied). The Court continued: "In such situations the official *asserts* that his official conduct *will be controlled* by the terms or promise of the undertaking." *Id.* (emphasis supplied). The "explicit" *quid pro quo* standard was necessary because "[t]o hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation" *Id.* at 272.

The Court's use of the words "explicit" "asserts," "controlled by the terms or promise" convey the need for articulated commitments, not inferences or implications, in order to satisfy the *McCormick* standard.

The court below affirmed Scrushy and Siegelman's conviction despite the absence of proof of "an explicit promise," or an official's assertion or agreement to be controlled by a promise. It did so saying "[i]nferring actors' states of mind from the circumstances surrounding their

conversation" is sufficient: "Bailey's testimony was competent evidence that Siegelman and Scrushy had agreed to a deal in which Scrushy's donation would be rewarded with a seat on the CON Board." App. 24a; *see* pp. 8, *supra*. No fair reading of Bailey's testimony – or any of the testimony – proved "an explicit promise," and *Evans* did not authorize a retreat from *McCormick's* concern that political contributions not be criminalized without proof beyond a reasonable doubt of "an explicit promise" of a *quid pro quo*. Watering down that principle by invoking Justice Kennedy's concurring opinion in *Evans* misapplies *Evans*. To allow a jury by implication, "'to decide [ ] the intent . . . [of the] actions taken as well as the reasonable construction given to them by the official and the payor'" (App. 24a), opens the door to that which the Court sought to avoid in *McCormick*: prosecutions based on inferences that campaign contributors' appointments were the product of bribery.

In *McCormick*, Justice Scalia wrote that receipt of money by a public official "should not be interpreted to cover campaign contributions with anticipation of favorable future action, as opposed to campaign contributions in exchange for *an explicit promise* of favorable future action." 500 U.S. at 276, Scalia, J., concurring (emphasis supplied). There can be no doubt that an explicit, not an inferred or implied promise, is the *sine qua non* for a criminal conviction in a campaign contribution case.

United States v. Evans does not support the Eleventh Circuit's deviation from the *McCormick* "explicit" rule. *Evans* was not a campaign contribution case. The defendant in Evans took $7,000 cash to vote in favor of a rezoning application. The difference is important. The Court was careful in *McCormick* to limit the decision to campaign

contributions, and Justice Thomas emphasized that in his dissent in *Evans*. 504 U.S. at 287, Thomas, J., dissenting, joined by Chief Justice Rehnquist and Justice Scalia. Moreover, review in *Evans* was granted "to resolve a conflict in the Circuits over the question whether an affirmative act of inducement by a public official, such as a demand, is an element of the offense of extortion 'under color of official right' prohibited by the Hobbs Act. . . ." 504 U.S. at 256. *Evans* did not intend to, or attempt to, water down "explicit." The only question in *Evans* was whether a public official had to take the first step – "induce" the payment.

Thus the Eleventh Circuit's use of *Evans* to dilute "explicit" presents important questions for this Court: Did *Evans* alter the *McCormick* standard? Does *Evans*, in which review was granted only on the question of whether an "inducement" or demand is an element of the offense of extortion "under color of official right," stand for the proposition that "explicit" means inferred or implied? The court below candidly acknowledged that "McCormick does use the word 'explicit' when describing the sort of agreement that is required to convict a defendant for extorting campaign contributions." App. 18a. But, drawing on *Evans*, the court said that "does not however mean *express*." *Id.* (emphasis in original). Interestingly, "express" means "to put thought into words: to express an idea clearly." Webster's Encyclopedic Unabridged Dictionary of the English Language (1996). Even the Eleventh Circuit's semantic circumlocution cannot evade *McCormick's* mandate.

It is for this Court to decide what "explicit" means and the Court should make that decision in a case which poses the question in the context of the campaign contribution First

Amendment concerns that animated *McCormick*. This case provides that opportunity.

The important principles that motivated *McCormick* support granting review to resolve the interplay, if any, between *McCormick* and *Evans*.

II. CONFUSION AND CONFLICT IN THE CIRCUITS ABOUT THE IMPACT OF *EVANS* ON *McCORMICK'S* "EXPLICIT PROMISE" REQUIREMENT IS ANOTHER REASON FOR GRANTING REVIEW

A series of Circuit Court cases reflect the struggles to reconcile *McCormick* and *Evans*. *United States v. Blandford*, 33 F.3d 685 (6th Cir. 1994) states it plainly: "Exactly what effect *Evans* had on *McCormick* is not altogether clear. The federal circuits that have considered the matter assume that the former [*Evans*] establishes a modified or relaxed *quid pro quo* standard to be used in non-campaign contribution cases. Under this view, the comparatively strict standard of *McCormick* would still govern when the alleged Hobbs Act violation arises out of the receipt of campaign contributions by a public official." *Id.* at 695. The court cited *United States v. Martinez*, 14 F.3d 543, 553 (11th Cir. 1994), *United States v. Taylor*, 993 F.2d 382, 385 (4th Cir. 1993) and *United States v. Garcia*, 992 F.2d 409 (2d Cir. 1993) for that view, but the Sixth Circuit then took a different tack:

> We read *Evans* somewhat differently. *Evans*, we believe, merely clarified (1) that no affirmative step towards the performance of the public official's promise need be taken (*i.e.* fulfillment of the *quid pro quo* is not an element of the offense) and (2) that the

> *quid pro quo* of *McCormick* is satisfied by something short of a formalized and thoroughly articulated contractual arrangement (*i.e.*, merely knowing the payment was made in return for official acts is enough).

Blandford, 33 F.3d at 696. That court concluded that "*Evans* provided a gloss on the *McCormick* Court's use of the word 'explicit' to qualify its *quid pro quo* requirements. Explicit as explained in *Evans*, speaks not to the form of the agreement between the payor and payee, but to the degree to which the payor and payee were aware of its terms, regardless of whether those terms were articulated." *Id.* at 696. However, *Blandford* continued:

> Pursuant to our interpretation of *Evans*, we cannot be certain whether the Supreme Court would have courts apply a different standard when a public official's acceptance of payments that are concededly not campaign contributions forms the basis for that official's extortion charge. Indeed, a strong argument could be advanced for treating campaign contribution cases and non-campaign contribution cases disparately. Campaign contributions, as the *McCormick* Court noted, enjoy what might be labeled a presumption of legitimacy. Although legitimate campaign contributions, not unlike Hobbs Act extortion payments, are given with the hope, and perhaps expectation, that the payment will make the official more likely to support the payor's interests, we punish neither the giving nor the taking presumably because we have decided that the alternative of financing campaigns with public funds is even less attractive than the current arrangement.

Id. at 697.

It is clear that the *McCormick/Evans* struggle continues. *United States v. Abbey*, 560 F.3d 513 (6th Cir. 2009) began its analysis this way: "This Court took its first stab at harmonizing these decisions in *United States v. Blandford* . . . . In *Blandford* we stated that *McCormick's quid pro quo* requirement should not apply outside the campaign-contribution context . . . ." *Id.* at 517. *Abbey* then pointed to *United States v. Collins*, 78 F.3d 1021 (6th Cir. 1996) which called for *quid pro quo* proof in all Hobbs Act cases, adding this new luster to the inquiry: "But not all *quid pro quos* are made of the same stuff." *Id.* The court then quoted a Don Corleone/Bonasera colloquy from *The Godfather* as an example "of a corrupt *quid pro quo*." *Id.* at 518 n.3. Seeking help from screenwriters underscores the need for this Court to have the final say.

The linguistic turmoil persists across the circuit decisions trying to resolve the *McCormick/Evans* meaning. The Ninth Circuit wrote that *McCormick* held "the government must prove that there was an explicit *quid pro quo*," and continued:

> *see also United States v. Ganim*, 510 F.3d 134, 142 (2d Cir. 2007) ("[P]roof of an express promise is necessary when the payments are made in the form of campaign contributions."). However, "[w]hether or not there is a *quid pro quo* requirement in the non-campaign context is an issue that has not been directly addressed by the Supreme Court." *United States v. Collins*, 78 F.3d 1021, 1034 (6th Cir. 1996)

United States v. Kincaid-Chauncey, 556 F.3d 923 (9th Cir. 2009). The Ninth Circuit, using "express" as a synonym for

"explicit," acknowledged the *quid pro quo* difference between campaign and non-campaign contexts: "[I]t is well established that to convict a public official . . . for receipt of property *other than campaign contributions* '[t]he official and the payor need not state the *quid pro quo* in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods.'" *Evans*, 504 U.S. at 274 (Kennedy, J. concurring). *See id.* at 268 (majority opinion)." *Kincaid-Chauncey* at 937 (emphasis supplied).

Thus *Kincaid-Chauncey's* reading of *McCormick/Evans* properly draws a distinction between campaign contribution cases and non-campaign contribution cases. The additional question is whether there is a quantum of proof difference between campaign contribution cases and non-campaign contribution cases. This Court should also resolve that question.

The Eleventh Circuit read too much into Justice Kennedy's "winks and nods" in his concurring opinion in *Evans*. That was the court's major rationale for retreating from "explicit," applying a less rigorous standard, improperly we submit, to campaign contributions cases.

Judge Berzon's concurrence in *Kincaid-Chauncey*, although addressing a different aspect of honest services prosecutions, articulated the reasons why clarifying *McCormick vis-á-vis Evans* is so important in this case:

> The stakes are considerably higher in the case of public officials. The lack of statutory specification can give rise to selective prosecution and political misuse. *See* Thomas M. DiBiagio, *Politics and the Criminal Process: Federal Public Corruption*

> *Prosecutions of Popular Public Officials Under the Honest Services Component of the Mail and Wire Fraud Statutes,* 105 Dick.L.Rev. 57, 57-58 (2000) ("With no established standards, a federal public corruption prosecution, based on the intangible right to honest services, is particularly vulnerable to being snarled by politics."); *see also United States v. Margiotta*, 688 F.2d 108, 143 (2d Cir. 1982) (Winter, J., dissenting) ("It may be a disagreeable fact but it is nevertheless a fact that political opponents not infrequently exchange charges of 'corruption,' 'bias,' 'dishonesty,' or deviation from 'accepted standards of . . . fair play and right dealing.' Every such accusation is now potentially translatable into federal indictment." (alteration in the original)). As the Third Circuit observed, "[d]eprivation of honest services is perforce an imprecise standard, and rule of lenity concerns are particularly weighty in the context of prosecutions of political officials, since such prosecutions may chill constitutionally protected political activity." *Paranella*, 277 F.3d at 698.

Kincaid-Chauncey at 949.

That brings us full circle to the Eleventh Circuit's recognition of "the First Amendment core values" that are at stake here. App.23a. The Scrushy/Siegelman prosecution stemmed from contributions to an education lottery campaign. Were there political considerations in play in bringing the charges? Perhaps. But the question for this Court transcends the hurly-burly of politics; it goes to the heart of what the Government must prove to criminalize the exercise of the First Amendment right to support a candidate or public issue referenda.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JAMES K. JENKINS
MALOY JENKINS PARKER
75 Fourteenth Street, NW
25th Floor
Atlanta, GA 30309
(404) 875-2700

BRUCE ROGOW
Counsel of Record
BRUCE S. ROGOW, P.A.
500 East Broward Blvd.,
Suite 1930
Fort Lauderdale, FL 33394
(954) 767-8909

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED MARCH 6, 2009

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 07-13163

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DON EUGENE SIEGELMAN,
RICHARD SCRUSHY,

Defendants-Appellants.

Appeal from the United States District Court
for the Middle District of Alabama

(March 6, 2009)

Before EDMONDSON, Chief Judge, TJOFLAT and HILL, Circuit Judges.

PER CURIAM:

Don Eugene Siegelman is the former Governor of Alabama. Richard Scrushy is the founder and former Chief Executive Officer of HealthSouth Corporation, a major hospital corporation with operations throughout

Alabama. The defendants were convicted of federal funds bribery, in violation of 18 U.S.C. § 666(a)(1)(B), and five counts of honest services mail fraud and conspiracy, in violation of 18 U.S.C. §§ 1341, 1346, and 18 U.S.C. § 371. Siegelman was also convicted of obstruction of justice, in violation of 18 U.S.C. § 1512(b)(3).

The defendants' bribery convictions were based on allegations that they made and executed a corrupt agreement whereby Scrushy gave Siegelman $500,000 in exchange for Siegelman's appointing him to Alabama's Certificate of Need Review Board (the "CON" Board). The honest services mail fraud convictions incorporated the same bribery allegations, but also alleged that Scrushy used the CON Board seat obtained from Siegelman to further HealthSouth's interests. Siegelman's obstruction of justice conviction is based on allegations that he corruptly influenced another to create a series of sham check transactions to cover up a "pay-to-play" payment to him.[1]

This is an extraordinary case. It involves allegations of corruption at the highest levels of Alabama state government. Its resolution has strained the resources of both Alabama and the federal government.

But it has arrived in this court with the "sword and buckler" of a jury verdict. The yeoman's work of our

---

1. The obstruction of justice allegations involved conduct unrelated to the Siegelman-Scrushy bribery, mail fraud and conspiracy charges.

judicial system is done by a single judge and a jury. Twelve ordinary citizens of Alabama are asked to sit through long days of often tedious and obscure testimony and pore over countless documents to decide what happened, and, having done so, to apply to these facts the law as the judge has explained it to them. And they do. Often at great personal sacrifice. Though the popular culture sometimes asserts otherwise, the virtue of our jury system is that it most often gets it right. This is the great achievement of our system of justice. The jury's verdict commands the respect of this court, and that verdict must be sustained if there is substantial evidence to support it. *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942).

Furthermore, to the extent that the jury's verdict rests upon their evaluations of the credibility of individual witnesses, and the reasonable inferences to be drawn from that testimony, we owe deference to those decisions. In our system, the jury decides what the facts are, by listening to the witnesses and making judgments about whom to believe. This they have done, and, though invited to do so,[2] we shall not substitute our judgment for theirs.

This is not to say that the judgment below is inviolable. Our duty as an appellate court is to answer properly presented questions from the parties in the case as to whether the law was correctly interpreted

---

2. The defendants assert that this is a case in which we owe no deference to the jury's findings of fact, but we disagree.

and applied by the district court. Juries apply the law as the judge instructs them, and the defendants' lawyers assert that there were errors in those instructions. Defendants also contend that there were other legal mistakes committed during the course of this trial. With this in mind, we have reviewed the claims of legal error in the proceedings below, and our opinion as to their merit follows. First, however, we recount the facts as the jury found them.[3]

I.

Don Siegelman was elected Governor of Alabama in 1998 on a campaign platform that advocated the establishment of a state lottery to help fund education in Alabama. After his election, he established the Alabama Education Lottery Foundation (the "Foundation") to raise money to campaign for voter approval of a ballot initiative to establish a state lottery. Darren Cline, the Foundation's fundraising director, testified that Siegelman "called the shots" on the lottery campaign. The lottery initiative was eventually defeated in a referendum held in October of 1999.

On March 9, 2000, the Foundation borrowed $730,789.29 from an Alabama bank in order to pay down debt incurred by the Alabama Democratic Party for get-out-the-vote expenses during the lottery campaign. This

---

3. Where the jury need not have found a particular fact to be established in order to reach their verdict, we indicate who testified to that fact.

note was personally and unconditionally guaranteed by Siegelman.[4]

Richard Scrushy, the CEO of HealthSouth had served on the CON Board under three previous governors of Alabama. The CON Board is an arm of the State Health Planning and Development Agency and exists to prevent unnecessary duplication of healthcare services in Alabama. The Board determines the number of healthcare facilities in Alabama through a process that requires healthcare providers to apply for and obtain a certificate of a healthcare need before opening a new facility or offering a special healthcare service. The CON Board decides which healthcare applications will be approved for an announced healthcare need, choosing between competing applications and ruling on objections filed by an applicant's competitor. The Governor of Alabama has sole discretion to appoint the members of the CON Board, who serve at his pleasure.[5] Scrushy had supported Siegelman's opponent in the just prior election.

Nick Bailey was one of Siegelman's closest associates and had worked on Siegelman's campaign for governor. Cline testified that "whatever [Bailey] told me that the Governor wanted was what the Governor said." Cline also testified that "if the Governor wanted to get

---

4. There was another personal guarantor, but each was individually liable.

5. Three of the nine seats on the Board are reserved for health care industry providers.

something done, then [Bailey] went ahead—blindly went ahead and did it."

Bailey testified that, after Siegelman's election in 1998, Siegelman met with Eric Hanson, an outside lobbyist for HealthSouth, and told Hanson that because Scrushy had contributed at least $350,000 to Siegelman's opponent in the election, Scrushy needed to "do" at least $500,000 in order to "make it right" with the Siegelman campaign. Bailey testified that Siegelman was referring to the campaign for the lottery initiative, and that Hanson was to relay this conversation to Scrushy. Bailey also testified that, in another conversation, Hanson told Bailey that Scrushy wanted control of the CON Board.

Mike Martin is the former Chief Financial Officer of HealthSouth. He testified that having influence over the CON Board was important to Scrushy and HealthSouth because it determined the number of healthcare facilities in the state, thereby affecting HealthSouth's ability to grow. He testified that Scrushy told him that to "have some influence or a spot on the CON Board," they had to help Siegelman raise money for the lottery campaign. Scrushy said that if they did so, "[they] would be assured a seat on the CON Board." Martin testified, "[W]e were making a contribution . . . in exchange for a spot on the CON Board."

Bailey testified that lobbyist Hanson "made it clear to him that if Mr. Scrushy gave the $500,000 to the lottery campaign that we could not let him down" with

respect to the CON Board seat. Bailey also testified that he "reminded the Governor periodically of the conversations that [Bailey] had with Eric Hanson and the conversations that the Governor had with Eric Hanson about what Mr. Scrushy wanted for his contributions, and that was the CON Board."

Martin also testified that Scrushy told him that HealthSouth could not make the payment to the lottery campaign, nor could he do it personally because "we [HealthSouth] had not supported that and that his wife, Leslie, was against the lottery, and it would just look bad if HealthSouth made a direct contribution to the lottery, so we needed to ask—he instructed me in particular to ask our investment banker, Bill McGahan, from [the Swiss bank] UBS, to make the contribution."

Bill McGahan did not want to make such an "out of the norm" donation and hoped the matter would "go away." Over the next two weeks, Martin called McGahan at least once a day to ask him about the status of the UBS donation, and told McGahan that Scrushy was going to fire UBS if it did not make the contribution. Finally, Martin testified, Scrushy himself called McGahan to "put more pressure" on him to make the contribution.

McGahan testified that he did not want UBS to make such a large contribution directly, so he told Martin that he would get Integrated Health Services ("IHS") of Maryland to make the donation to the lottery campaign in exchange for UBS reducing an outstanding

fee that IHS owed UBS. IHS agreed to this arrangement and donated $250,000 to the Foundation in exchange for a reduction of $267,000 in the fee it owed UBS.

The IHS "donation" was in the form of a check dated July 19, 1999, made payable from itself to the Foundation. Martin testified that Scrushy told him it was important that he, Scrushy, hand deliver the IHS check to Siegelman, so Martin delivered the check to Scrushy so that he could do so.

Some time later,[6] Siegelman and Scrushy met in Siegelman's office. Bailey testified that after Scrushy left, Siegelman showed the IHS check to Bailey and told him that Scrushy was "halfway there." Bailey asked, "what in the world is he [Scrushy] going to want for that?" Siegelman replied, "the CON Board." Bailey then asked, "I wouldn't think that would be a problem, would it?" Siegelman responded, "I wouldn't think so."

Siegelman appointed Scrushy to the CON Board on July 26, 1999—one week after the date on the IHS check.[7] Siegelman directed Bailey to contact the Board chair-designee to tell her that Siegelman wanted Scrushy to be vice-chair of the CON Board, and the Board so chose. Bailey testified that Siegelman made

---

6. Bailey told the FBI that Scrushy gave the check to Siegelman in a meeting on July 14, 1999, but testified at trial that he did not remember exactly when the meeting was.

7. Seven other Board members were appointed that day.

Scrushy vice-chair "[b]ecause [Scrushy] asked for it." Scrushy stayed on the Board until January of 2001, at which time Siegelman appointed Thom Carman, HealthSouth's vice-president, to the remainder of Scrushy's term. Siegelman subsequently reappointed Carman to a full term. While Carman was on the Board, HealthSouth successfully applied for and received Certificates of Need for a mobile PET scanner and a rehabilitation hospital.

Darren Cline, the Foundation's fundraising director, testified that Siegelman gave him the IHS check and told him it was from Scrushy. Cline was concerned about the amount of the donation from one person, and Siegelman told him to hold the check. In November of 1999, however, at Siegelman's direction, Bailey retrieved the check and opened a new checking account in the Foundation's name at a Birmingham bank. Bailey made an initial deposit of $275,000—the $250,000 IHS check and a $25,000 check from another company. Cline was never told.

On March 9, 2000, the Foundation borrowed, from the same Birmingham bank, $730,789.29 to repay the Alabama Democratic Party's debt in connection with the lottery initiative and Siegelman guaranteed the loan. At that time, the Foundation had over $447,000 in its checking account at the bank, $250,000 of which had come from the IHS check deposited in November of 1999. On March 13, 2000, $440,000 was debited from the account to pay down the Foundation's loan.

In May, Siegelman and Bailey traveled to HealthSouth's headquarters in Birmingham, where Siegelman met privately with Scrushy in Scrushy's office. At that meeting, Scrushy gave Siegelman a check issued by HealthSouth for $250,000 payable to the Foundation.[8] On May 23, 2000, the $250,000 check was applied directly against the Foundation's loan balance.

The Foundation was required to disclose contributions received and expenditures made in statements filed with the Alabama Secretary of State. It failed to file timely any disclosure regarding any funds received until July of 2002, after Alabama newspapers questioned whether the financial dealings between the Foundation and the Alabama Democratic Party had been properly reported and the Secretary of State's Office had written a letter to the state Attorney General's Office about the Foundation's non-disclosure of the payoff of the Democratic Party's campaign loan. All funds received were then reported.

Lanny Young was a long-time business associate of Siegelman's who testified that he was part of a "pay-to-play" arrangement with Siegelman existing over many years. He testified that he would provide money, campaign contributions, and other benefits in return for official action, as needed, that benefited Young's

---

8. HealthSouth's political contributions coordinator testified that she did not know about the donation until she read about it in the newspaper. The Foundation's fundraising director testified that he was not present when Scrushy gave Siegelman either of the checks.

business interests. He testified that in January of 2000, Siegelman asked him for $9,200 to buy a motorcycle. The evidence was that Siegelman had already purchased the motorcycle. Young testified that he and Bailey worked out the details for the transaction.

Bailey testified that he did not want Young to give the money directly to Siegelman, so Bailey told Young to write the check to him, Bailey, which he deposited into his own account. He then wrote a check to Lori Allen, Siegelman's wife, which he gave to Siegelman and which was deposited into Siegelman's bank account that same day. There was testimony that a check written to the IRS for fourth quarter estimated taxes would not have cleared the account but for the $9200 deposit.

By June of 2001, Siegelman was well-aware of the federal-state investigation into the Foundation's finances and Siegelman's dealings with Young. Bailey and Young each testified that, in an effort to cover up Young's $9,200 payment to Siegelman, Bailey gave Young a check for $10,503.39, on which he noted "repayment of loan [the $9,200] plus interest" in order to make it appear that he had borrowed the $9,200 from Young. Bailey also wrote a check to Siegelman for $2,973.35 with the notation "balance due on m/c" to provide a reason for his borrowing money from Young, which was to purchase the motorcycle from Siegelman. Bailey testified that he did not borrow the money to buy the motorcycle, but that Young's $9,200 had gone through him to Siegelman and "we used the motorcycle to cover it up." Bailey testified that Siegelman was aware of and approved Bailey's writing of the $10,503.39 check to Young.

Bailey testified that he gave Siegelman the $2,973.35 check at the office of Siegelman's attorney, who, along with Bailey's own attorney, was present for the transfer. Neither lawyer was told that the purpose of the transaction was part of the coverup of the $9,200 payment from Young to Siegelman. Siegelman accepted the check, and provided Bailey with a bill of sale for the motorcycle, which the attorneys helped finalize. Bailey testified that he lied about the transaction to the lawyers, that he and Siegelman knew that the federal investigation was going on, and that he later lied to federal investigators about the transaction to protect himself and Siegelman.

II.

On December 12, 2005, a grand jury returned a second superseding indictment against Siegelman and Scrushy and two other defendants.[9] Both Siegelman and Scrushy were charged with federal funds bribery, honest services conspiracy and honest services mail fraud.[10] Siegelman was also charged with multiple counts of

---

9. The superseding indictment replaced an earlier version of the indictment.

10. The federal funds bribery statute criminalizes the taking of a bribe by an official of a state agency that receives over $10,000 in federal funds annually. 18 U.S.C. § 666. Honest services mail fraud criminalizes the mailing of a letter in connection with a scheme to defraud a state agency of an official's honest services in the performance of his official duties. 18 U.S.C. §§ 1341 and 1346.

racketeering conspiracy, racketeering, honest services wire fraud, obstruction of justice and extortion.

Trial on the indictment began on May 1, 2006. On June 29, 2006, the jury convicted Siegelman and Scrushy on the bribery, conspiracy and honest services mail fraud counts, and Siegelman was convicted of one count of obstruction of justice. The jury acquitted Siegelman on the remaining twenty-two counts. The other two defendants were acquitted on all counts against them.

Siegelman and Scrushy were each sentenced to approximately seven years in federal prison.[11]

On appeal, Siegelman and Scrushy together allege nine errors in the trial proceedings below. With respect to the bribery, conspiracy and honest services mail fraud counts against them, defendants assert that the court's instructions erroneously failed to require the jury to find a *quid pro quo* in order to convict; that, in any event, there was insufficient evidence of any *quid pro quo;* that the bribery counts were barred by the statute of limitations; and that the trial court erroneously admitted hearsay used to convict them on these counts. Defendants also allege that there was juror misconduct requiring the grant of a new trial and that the procedures used to select their grand and petit juries violated the Jury Selection and Services Act of 1968 and the Constitution. Siegelman contends that there was

---

11. Siegelman and Scrushy were denied bond pending appeal, but a panel of this court subsequently released Siegelman pending resolution of this appeal.

insufficient evidence that he obstructed justice and that the district court abused its discretion in sentencing him by upwardly departing from the Sentencing Guidelines. We shall consider each of these allegations of error in turn.

III.

1. *Bribery, Conspiracy and Honest Services Mail Fraud Counts.*

A. Jury Instructions

The bribery statute under which defendants were convicted makes it a crime for a state official to corruptly agree to accept anything of value from another person "intending to be influenced" in that person's favor in an official action. 18 U.S.C. § 666(a)(1)(B). The honest services mail fraud statute criminalizes the use of the mails to execute a scheme to defraud another of the right to a public official's honest services. 18 U.S.C. §§ 1341, 1346. The conspiracy statute prohibits two or more persons from conspiring to commit a federal offense. 18 U.S.C. § 371.

The bribery, conspiracy and honest services mail fraud convictions in this case are based upon the donation Scrushy gave to Siegelman's education lottery campaign.[12] As such, they impact the First Amendment's

---

12. Although the conspiracy and mail fraud counts alleged a broader scheme for Scrushy to self-deal once on the Board, (Cont'd)

core values—protection of free political speech and the right to support issues of great public importance. It would be a particularly dangerous legal error from a civic point of view to instruct a jury that they may convict a defendant for his exercise of either of these constitutionally protected activities.[18] In a political system that is based upon raising private contributions for campaigns for public office and for issue referenda, there is ample opportunity for that error to be committed.

The Supreme Court has sought to protect against this possibility by requiring more for conviction than merely proof of a campaign donation followed by an act favorable toward the donor. *McCormick v. United States*, 500 U.S. 257, 111 S.Ct. 1807, 114 L.Ed.2d 307 (1991). In reviewing a Hobbs Act prosecution, the federal crime of extortion under color of official right—

(Cont'd)

these counts also incorporated the allegations of an agreement between Siegelman and Scrushy to exchange money for the seat on the Board.

13. Arguably, the potential negative impact of these statutes on issue-advocacy campaigns is even more dangerous than it is to candidate-election campaigns. Issue-advocacy campaigns are a fundamental right in a free and democratic society and contributions to them do not financially benefit the individual politician in the same way that a candidate-election campaign contribution does. Defendants assert, and we do not know otherwise, that this is the first case to be based upon issue-advocacy campaign contributions.

demanding a campaign donation in return for taking some favorable official action—the Court said:

> Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. It is also true that campaigns must be run and financed. Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done. Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, "under color of official right." To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation.

Id. at 272, 111 S.Ct. 1807.

To avoid this result, the Court made clear that only if "payments are made in return for an *explicit* promise or undertaking by the official to perform or not to perform an official act, are they criminal." *Id.* at 273, 111 S.Ct. 1807 (emphasis added). The Court quoted the Court of Appeals for the Fifth Circuit, which had said that:

> A moment's reflection should enable one to distinguish, at least in the abstract, a legitimate solicitation from the exaction of a fee for a benefit conferred or an injury withheld. Whether described familiarly as a payoff or with the Latinate precision of *quid pro quo*, the prohibited exchange is the same: a public official may not demand payment as inducement for the promise to perform (or not to perform) an official act.

Id. (quoting *United States v. Dozier*, 672 F.2d 531, 537 (5th Cir.1982)).

While the Court has not yet considered whether the federal funds bribery, conspiracy or honest services mail fraud statutes require a similar "explicit promise," the Seventh Circuit Court of Appeals has observed that extortion and bribery are but "different sides of the same coin." *United States v. Allen*, 10 F.3d 405, 411 (7th Cir.1993).[14]

---

14. We acknowledge, as the defendants point out, that several district courts, in unpublished opinions, have extended the *McCormick* rationale to the bribery and honest service statutes. The government points to no contrary authority, relying instead on inapposite authority not involving campaign contributions.

Appendix A

The district court agreed to instruct the jury that they could not convict the defendants of bribery in this case unless "the defendant and the official *agree* that the official will take specific action in exchange for the thing of value." (emphasis added). This instruction was fashioned by the court in direct response to defendants' request for a *quid pro quo* instruction, and was given in addition to the Eleventh Circuit's pattern jury instruction for federal funds bribery cases. So, whether or not a quid pro quo instruction was legally required, such an instruction was given.

Defendants, however, assert that the instruction was inadequate under *McCormick*. Defendants assert that the instruction failed to tell the jury that not only must they find that Siegelman and Scrushy agreed to a *quid pro quo*, the CON Board seat for the donation, but that this agreement had to be *express*. We disagree that *McCormick* requires such an instruction.

McCormick does use the word "explicit" when describing the sort of agreement that is required to convict a defendant for extorting campaign contributions. It does not, however, mean *express*. Defendants argue that only "proof of actual conversations by defendants," will do, suggesting in their brief that only *express* words of promise overheard by third parties or by means of electronic surveillance will do.

But *McCormick* does not impose such a stringent standard. One year after *McCormick*, the Supreme Court approved the following jury instruction:

> However, if a public official demands or accepts money in exchange for [a] specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the [federal extortion statute] regardless of whether the payment is made in the form of a campaign contribution.

Evans v. United States, 504 U.S. 255, 258, 112 S.Ct. 1881, 119 L.Ed.2d 57 (1992). The Court held that the instruction "satisfies the *quid pro quo* requirement of *McCormick v. United States.*" *Id.* at 268, 111 S.Ct. 1807. The Court said that the "Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Id.*

The instruction approved in *Evans* required that the acceptance of the campaign donation be in return for a *specific* official action—a *quid pro quo.*[15] No generalized expectation of some future favorable action will do. The official must agree to take or forego some specific action in order for the doing of it to be criminal under Section 666. In the absence of such an agreement on a specific action, even a close-in-time relationship between the donation and the act will not suffice.

---

15. The Latin means "something for something," *Black's Law Dictionary* 1282 (8th ed.2004).

But there is no requirement that this agreement be memorialized in a writing, or even, as defendants suggest, be overheard by a third party. Since the agreement is for some specific action or inaction, the agreement must be *explicit*, but there is no requirement that it be *express*. To hold otherwise, as Justice Kennedy noted in *Evans*, would allow defendants to escape criminal liability through "knowing winks and nods." 504 U.S. at 274, 112 S.Ct. 1881 (Kennedy, J. concurring). *See also United States v. Blandford*, 33 F.3d 685, 696 (6th Cir.1994) ("*Evans* instructed that by 'explicit' *McCormick* did not mean express"); *United States v. Giles*, 246 F.3d 966, 972 (7th Cir.2001); *United States v. Tucker*, 133 F.3d 1208, 1215 (9th Cir.1998); *United States v. Hairston*, 46 F.3d 361, 365 (4th Cir.1995).[16]

Furthermore, an explicit agreement may be "implied from [the official's] words and actions." *Evans*, 504 U.S. at 274, 112 S.Ct. 1881 (Kennedy, J., concurring). As Justice Kennedy explained:

> The criminal law in the usual course concerns itself with motives and consequences, not

---

16. Nor is this court's prior holding in *United States v. Davis*, 30 F.3d 108 (11th Cir.1994), to the contrary. In *Davis*, we acknowledged that, after *McCormick*, "an explicit promise by a public official to act or not act is an essential element of Hobbs Act extortion, and the defendant is entitled to a reasonably clear jury instruction to that effect." *Id.* at 108. We reversed Davis' conviction not only because his jury did not receive a reasonably clear instruction, but because the court in that case "informed the jury that 'a specific *quid pro quo* is not always necessary for a public official to be guilty of extortion.' " *Id.*

> formalities. And the [jury] is quite capable of deciding the intent with which words were spoken or actions taken as well as the reasonable construction given to them by the official and the payor.

Id. See also United States v. Massey, 89 F.3d 1433, 1439 (11th Cir.1996) (holding that bribery conviction under general federal bribery statute, 18 U.S.C. § 201, may be supported by "inferences drawn from relevant and competent circumstantial evidence").

In this case, the jury was instructed that they could not convict the defendants of bribery unless "the Defendant and official *agree* that the official will take *specific* action in *exchange* for the thing of value." This instruction required the jury to find an agreement to exchange a specific official action for a campaign contribution. Finding these facts would satisfy *McCormick*'s requirement for an explicit agreement involving a *quid pro quo*. Therefore, *assuming* a *quid pro quo* instruction was required in this case, we find no reversible error.[17]

---

17. Because the conduct charged in the conspiracy and honest services mail fraud counts incorporates the conduct alleged in the federal funds bribery counts, on which the jury was instructed to find a *quid pro quo*, any failure to adequately instruct the jury on a *quid pro quo* requirement for the conspiracy and honest services counts was harmless. *See Cupp v. Naughten*, 414 U.S. 141, 148-48, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973) (jury instructions must be evaluated as a whole).

Appendix A

B. Evidence on the Bribery, Conspiracy and Honest Services Mail Fraud Convictions

1. *The Bribery, Conspiracy and Related Mail Fraud Counts*[18]

Defendants argue that the sole evidence of any explicit *quid pro quo* in connection with Siegelman's appointment of Scrushy to the CON Board was Bailey's testimony regarding the conversation he had with Siegelman following the meeting at which Scrushy delivered the first $250,000 check to Siegelman, and that this evidence was legally insufficient to support the jury's finding of a *quid pro quo*. We disagree.

Bailey testified that after the meeting, Siegelman showed him the check, said that it was from Scrushy and that Scrushy was "halfway there." Bailey asked "what in the world is he going to want for that?" Siegelman replied, "the CON Board." Bailey then asked, "I wouldn't think that would be a problem, would it?" Siegelman responded, "I wouldn't think so."

Defendants assert that this conversation shows that there was *not* an explicit or express agreement at this time between Siegelman and Scrushy. They argue that the conversation on its face indicates that, at best, there

---

18. Counts 6 and 7 charge Mail Fraud in connection with the mailings of the letters appointing (Count 6) and reappointing (Count 7) Thom Carman as Scrushy's replacement on the CON Board in connection with the bribery scheme.

was only some vague expectation about the future. Defendants assert that Bailey's testimony shows at most that:

> Governor Siegelman knew, or at least thought, that Scrushy wanted a C.O.N. Board appointment in recognition of the contribution—and that Governor Siegelman didn't think that making such an appointment would present a problem.

According to defendants, even if the conversation between Bailey and Siegelman took place exactly as Bailey recounts, "no one can 'infer' from the alleged conversation recounted by Bailey that a true explicit promise or agreement had happened behind closed doors."

What is missing in this record, according to defendants, is any evidence of a discussion between Governor Siegelman and Scrushy to the effect of "I will make this contribution, and in exchange for this contribution you will appoint me. Are we agreed on that?" "Yes we are."[19] In the absence of such evidence, according to the defendants, no reasonable juror could infer an explicit agreement between Siegelman and Scrushy.

---

19. This suggestion as to the evidence that would be sufficient is asserted in Siegelman's brief.

We disagree. Inferring actors' states of mind from the circumstances surrounding their conversation, from their actions, and from their words spoken at the time is precisely the province of the jury. As we noted above, "the [jury] is quite capable of deciding the intent with which words were spoken or actions taken as well as the reasonable construction given to them by the official and the payor." *See Evans*, 504 U.S. at 274, 112 S.Ct. 1881 (Kennedy, J., concurring). In making these judgments, jurors are presumed to use their common sense and are free to choose among reasonable constructions of the evidence. *See United States v. Mosquera*, 779 F.2d 628, 630 (11th Cir.1986). Bailey's testimony was competent evidence that Siegelman and Scrushy had agreed to a deal in which Scrushy's donation would be rewarded with a seat on the CON Board. The jurors were free to give it a different construction, but they did not.

Furthermore, this was not the sole evidence that Scrushy bribed Siegelman. The jury was entitled to construe this conversation in the context of the substantial additional testimony they had heard regarding Scrushy's donation to the lottery campaign fund.

For example, Bailey repeatedly testified, without qualification, that Siegelman and Scrushy had an explicit agreement to exchange money for a seat on the CON Board.[20] Bailey also testified that Siegelman met with Eric

---

20. Defense counsel also recognized this fact. Scrushy's counsel said to Bailey on cross-examination, "I'm talking about your testimony that there was some exchange of official action for the payments that Mr. Scrushy gave, all right."

Hanson, an outside lobbyist for HealthSouth, and told him that because Scrushy had contributed at least $350,000 to Siegelman's opponent in the general election that Scrushy needed to "do" at least $500,000 in order to "make it right" with the Siegelman campaign. Bailey testified that Siegelman was referring to the campaign for the lottery initiative, and that Hanson was to relay this conversation to Scrushy. Bailey also testified that, in another conversation, Hanson told Bailey that Scrushy wanted control of the CON Board.

Martin corroborated Bailey's testimony when he stated that "[h]e [Scrushy] told me that if we raised that money, then we would have a spot on the CON Board," and "We were making a contribution . . . in exchange for a spot on the CON Board." Martin also testified that Hanson bragged about getting HealthSouth a seat on the CON Board with the help of the IHS check.

Cline testified that Siegelman told him that Scrushy was responsible for the first $250,000 check and that "there was another $250,000 that would be coming." Cline also testified that the receipt of the checks by the Foundation was not reported until after newspaper articles questioning the Foundation's finances.[21]

McGahan's testimony regarding Scrushy's solicitation of him to make the donation also supported

---

21. There was testimony that all other contributions to the Foundation were similarly not reported, but the jury was free to choose the reasonable inference that the failure to report the licit contributions was to conceal the illicit ones.

an inference that the donation was illicit. Loretta Skeleton, HealthSouth's lawyer, testified that, although she was responsible for HealthSouth political contributions, she was told nothing about the $500,000 donations.

Finally, the close relationship in time between the first check and Siegelman's appointment of Scrushy was also some evidence of *quid pro quo*.

In sum, the evidence was sufficient such that a reasonable juror could have concluded that Siegelman and Scrushy explicitly agreed to a corrupt *quid pro quo*, thereby proving the bribery, conspiracy and the two related mail fraud counts (Counts 6 and 7).

2. *The Honest Services Mail Fraud Counts 8 and 9*

Siegelman separately challenges his mail fraud convictions on Counts 8 and 9 of the indictment, each of which charged that he caused a mailing that helped to execute a scheme between himself and Scrushy to deprive the State of Alabama of its right to their honest services as the Governor and as a member of the CON Board. Counts 8 and 9 alleged that the scheme included not only the exchange of the seat on the CON Board for the $500,000 lottery campaign, but also that Scrushy "would and did use his seat on the CON Board to attempt to affect the interests of HealthSouth and its competitors," and that Scrushy "would and did offer things of value to another Board member to attempt to

affect the interests of HealthSouth and its competitors." Although Scrushy was not on the Board when the alleged self-dealing occurred, the indictment charged that it was part of the scheme that Siegelman and Scrushy "orchestrated Scrushy's replacement on the Board by another person employed by HealthSouth." The mailings charged in connection with these allegations were letters sent by the Board to HealthSouth, notifying it that it had been awarded Certificates of Need in connection with the rehabilitation hospital (Count 8) and the PET scanner (Count 9). Siegelman claims that the evidence at trial was insufficient to support his knowing participation in this alleged scheme.[22]

The evidence at trial was that Scrushy resigned from his seat on the Board in January of 2001 and that, the next day, Siegelman appointed Thom Carman, HealthSouth vice-president, to the remainder of the term. When Scrushy's term expired in July, Siegelman reappointed Carman.

While on the Board, Carman employed another member of the Board, Tim Adams, to prepare the application for the PET scanner, paying him $8000 to do so.[23] There was also testimony that Adams was paid another $3000 for "additional work he apparently had done on the PET scanner application" in return for his

---

22. Scrushy does not make this argument.

23. There was testimony that Adams had never written a CON Board application, and that his work was substandard.

agreement to attend the CON Board meeting at which HealthSouth's application for a rehabilitation hospital in Phenix City was considered. At the meeting, Carman recused himself from voting on the application. Adams attended, and although he abstained from voting, under the Board's rules, his abstention did not affect the quorum his presence established, thus permitting a vote to be taken. There was no opposition to the application and the Board unanimously approved the application.

Six months later, the PET scanner application was also approved. At this meeting, Adams' presence was not necessary to the quorum. Carman recused himself, and Adams abstained from voting. The application was unopposed and passed unanimously.

Alva Lambert, the Executive Director of the Board, testified that unopposed applications were routinely approved, and that both these applications were consistent with prior Board actions. There was no evidence that Siegelman knew of Carman's actions in hiring Adams to prepare the application. There was no evidence that he knew of any of these Board actions.

Siegelman challenges the sufficiency of this evidence to establish that he caused the Board letters to be mailed to HealthSouth, informing it of the award of Certificates of Need in connection with the PET scanner or the rehabilitation hospital. Since there was no evidence that Siegelman participated in the events forming the basis for the charges in Counts 8 and 9, nor even that he had any knowledge of these events,

Siegelman argues he cannot be held liable for this conduct on a theory of *respondeat superior* or vicarious liability. In view of our holding that the jury's finding of an explicit agreement between Siegelman and Scrushy to exchange money for a seat on the CON Board is supported by the evidence, we shall address whether the law permits Siegelman to be held liable for Scrushy's subsequent conduct on the Board.

It is the law of this circuit, as well as others, that all who with criminal intent join themselves to the principal scheme may be guilty of a violation of the mail fraud statute. *United States v. Toney*, 598 F.2d 1349, 1355 (5th Cir.1979). *See also United States v. Stapleton*, 293 F.3d 1111, 1117 (9th Cir.2002) ("Like co-conspirators, 'knowing participants in the scheme are legally liable' for their co-schemers use of the mails or wires"); *United States v. Leahy*, 445 F.3d 634, 656 (3d Cir.2006); *United States v. Stull*, 743 F.2d 439 (6th Cir.1984); *United States v. Sedovic*, 679 F.2d 1233 (8th Cir.1982); *United States v. Read*, 658 F.2d 1225 (7th Cir.1981). Each person who is knowingly a party to the principal scheme is liable for the acts of other schemers in pursuance of that scheme. *Toney*, 598 F.2d at 1355.

Recently, in *United States v. Ward*, 486 F.3d 1212 (11th Cir.2007), we reiterated this long-standing principle that, if one participant in a fraudulent scheme causes a use of the mails in execution of the fraud, all other knowing participants in the scheme are legally liable for that use of the mails:

> For nearly as long as mail fraud has been a federal crime, it has been the law in this Circuit, and in the former Fifth Circuit, that a defendant may be convicted of mail fraud without personally committing each and every element of mail fraud, so long as the defendant knowingly and willfully joined the criminal scheme, and a co-schemer used the mails for the purpose of executing the scheme.

Id. at 1222.

It may be assumed, then, that Siegelman did not sign or cause to be mailed either of the letters set out in Counts 8 and 9, or even that he participated in the events generating those letters. He may, nevertheless, be held criminally liable for Scrushy's conduct on the Board if he was a knowing party to a scheme that included that conduct.

The question regarding these counts is whether the criminal scheme charged in the indictment was broader than the initial pay-to-play agreement between Siegelman and Scrushy, but also included agreement on the broader objective of permitting or promoting Scrushy's self-dealing while on the Board. If so, it is immaterial that Siegelman may not have known about each particular success in that scheme or caused to be mailed the CON Board letters that furthered that scheme. "A partnership in crime being established against both appellants, the acts of [Scrushy] in furtherance of the common criminal enterprise were in

law the acts of [Siegelman] also." *See Belt v. United States*, 73 F.2d 888, 889 (5th Cir.1934).

Just as in *Ward*, where the defendant denied knowledge of both the mailing and the circumstances prompting it, Siegelman's lack of involvement in causing a specific mailing and the circumstances prompting it are immaterial so long as there is sufficient evidence to show that he was a knowing participant in the broader fraudulent scheme, which involved the use of the mails. *See Ward*, 486 F.3d at 1223 (citing *United State v. Bright*, 588 F.2d 504 (5th Cir.1979)).

Counts 8 and 9 charge a scheme broader than the initial pay-for-play agreement. These counts alleged that Siegelman and Scrushy agreed not only to exchange money for a seat on the Board, but also that Scrushy "would and did use his seat on the CON Board to attempt to affect the interests of HealthSouth and its competitors," and that Scrushy "would and did offer things of value to another Board member to attempt to affect the interests of HealthSouth and its competitors." The government argues in its brief that not only did Siegelman know that Scrushy wanted the seat in order to self-deal on the CON Board, but that "it was certainly foreseeable to Siegelman that Scrushy would bribe another Board member to further HealthSouth's interests" since "[a]fter all, Scrushy paid Siegelman $500,000 to get HealthSouth a seat on the Board in the first place." Thus, the indictment charges a broader scheme that would subject Siegelman to criminal liability for Scrushy's actions on the Board so long as Siegelman was a knowing participant in that broader scheme.

The final question, then, is whether the government proved that scheme. In order to uphold Siegelman's convictions on Counts 8 and 9, the evidence must have been sufficient for the jury to conclude both that Siegelman knew that Scrushy intended to defraud Alabama of his honest services while on the Board and that Siegelman personally intended to participate in this fraud. We hold that it was not.

The testimony in support of the government's allegation of a pay-to-play scheme whereby Scrushy paid Siegelman for a seat on the CON Board came principally from Bailey, Martin, Young, McGahan, and Skelton. Of these witnesses, only Skeleton, HealthSouth's lawyer in charge of certificates of need, had any knowledge about Scrushy's subsequent alleged self-dealing while on the CON Board. Her testimony, however, did not mention Siegelman. Alva Lambert, the Executive Director of the CON Board during the relevant time and the other primary government witness in support of the allegations of Scrushy self-dealing, testified that the Siegelman CON Board was an "extremely well-balanced" Board, that CON Boards had never to his knowledge turned down an application for a PET scanner, and that he never saw Siegelman exert any influence or try to exert any influence whatsoever over a Board decision.

Neither in its brief nor at oral argument did the government point to *any* testimony in support of its allegation that Siegelman and Scrushy agreed to a broader scheme in which Scrushy would self-deal on the

Board. Nor has our independent and careful review of record revealed any.

Rather, the government's brief argues that Siegelman's knowing participation in the broader self-dealing scheme may be inferred from three facts proven at trial: first, that Siegelman and Scrushy agreed to exchange the CON Board seat for money; second, that the amended Foundation financial statements that disclosed the Scrushy donations, which were filed around the time of the mailings, did not list Scrushy as the ultimate source of the IHS check; and third, that Siegelman was still governor when the Pet scanner and Phenix City projects were approved and could have removed Scrushy or Carman from the Board at any time. The first two of these facts relate primarily to the initial pay-to-play scheme, and the final fact is not sufficient to show participation in a broader scheme, much less knowing participation. None is remotely sufficient to permit a jury to infer that Siegelman agreed to a broader self-dealing scheme.

In view of this absolute lack of any evidence whatsoever from which the jury could infer that Siegelman knowingly agreed to or participated in a broader scheme that included Scrushy's alleged subsequent self-dealing while on the Board, we shall reverse Siegelman's convictions on these counts.

Appendix A

2. *Bribery Counts and the Statute of Limitations*

Defendants claim that their bribery convictions are time-barred because the statute of limitations began to run no later than the date of Siegelman's receipt of the IHS check or Scrushy's appointment and the indictment was returned more than five years after that. They did not, however, raise this argument before the district court, either in a pretrial motion or at trial. It is, therefore, waived.

Defendants do not dispute that they first raised this limitations claim in motions for judgment of acquittal under Fed.R.Crim.P. 29(c), over one month after the jury rendered its verdict. We have previously rejected such attempts to challenge the sufficiency of the indictment after the trial. *United States v. Ramirez*, 324 F.3d 1225 (11th Cir.2003). In *Ramirez*, we rejected a limitations defense raised by way of a post-trial Rule 29 motion. *Id.* We held that "when a statute of limitations defense is clear on the face of the indictment and requires no further development of facts at trial, a defendant waives his right to raise that defense by failing to raise it in a pretrial motion." *Id.* at 1228-29.

Even where the facts are at issue regarding the limitations period, this court and its predecessor have long held that "the statute of limitations is a matter of defense that must be asserted at trial by the defendant" and that failure to do so results in a waiver. *United States v. Najjar*, 283 F.3d 1306, 1308 (11th Cir.2002); *accord Capone v. Aderhold*, 65 F.2d 130, 131 (5th Cir.1933). Other

circuits agree. *See, e.g., United States v. Gallup*, 812 F.2d 1271 (10th Cir.1987); *United States v. Karlin*, 785 F.2d 90, 92-93 (3d Cir.1986).

Requiring the defendant to assert a limitations defense at trial gives the prosecution a fair opportunity to rebut the defense through additional evidence or during summation. *See United States v. Arky*, 938 F.2d 579, 582 (5th Cir.1991); *United States v. Oliva*, 46 F.3d 320, 324-25 (3d Cir.1995). Furthermore, the "determination of when the crime has been committed for statute of limitations purposes . . . is ordinarily a question of fact for the jury." *Oliva*, 46 F.3d at 324-25.

Allowing a defendant to raise a limitations defense for the first time in a post-verdict Rule 29 motion "is inconsistent with the characterization of the statute of limitations as an affirmative defense and would unfairly sandbag the government." *United States v. Thurston*, 358 F.3d 51, 63 (1st Cir.2004), *vacated on other grounds*, 543 U.S. 1097, 125 S.Ct. 984, 160 L.Ed.2d 988 (2005).

The defendants apparently made a strategic decision not to present a statute of limitations defense at trial. Such a defense would have required them to make an argument to the jury that assumed their guilt on the bribery charges. While defendants are free to make the strategic decision not to do so, they may not later be heard to complain when the claim is held to have been waived.

3. *Sufficiency of the Evidence of Obstruction of Justice*

Siegelman was charged with two counts of obstruction of justice.[24] The indictment alleged and the government undertook to prove that eighteen months after the $9200 pay-to-play payment to Siegelman from Lanny Young, Siegelman and Bailey became aware of the federal-state corruption investigation and instigated a series of sham check transactions in an effort to coverup the payment. The coverup was designed to make it appear that Bailey had borrowed the $9200 from Young so that he could buy a motorcycle from Siegelman.

Count 16 alleged that Siegelman corruptly persuaded Bailey to write a check for $10,503 to Young with the notation "repayment of loan plus interest." Count 17 alleged that Siegelman corruptly persuaded Bailey to write and give him a check for $2973.35 with the notation on it that it was the "balance due on m/c." Count 17 also alleged that Siegelman engaged in misleading Bailey's attorney with the intent to hinder or prevent the attorney's communication of information regarding these transactions to the FBI.

---

24. Section 1512(b)(3) provides in pertinent part:

> Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—
>
> ...
>
> (3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense . . .

Appendix A

The jury acquitted Siegelman of Count 16, but convicted him on Count 17. Siegelman contends that the evidence was insufficient to show that he persuaded Bailey to write the check charged in Count 17 or that he misled Bailey's attorney. We turn now to the evidence.

At trial, Young testified that in January of 2000, Siegelman asked him for $9200 to buy a motorcycle and that he gave it to Siegelman as part of the pay-to-play, on-going agreement he had with Siegelman. He also testified that, eighteen months later, after the federal-state corruption investigation began, he and Bailey had the following conversation:

> Young: Right after the investigation started, Nick [Bailey] called me and asked me if I could recall how I made out the check for the motorcycle. And I said—on what account I had written the check for the motorcycle. And I said no, why? He said because if it's on one of your personal accounts, you are going to have a motorcycle in your driveway tonight.

Bailey testified that the coverup began when:

> Bailey: I found out about the investigation that was going on with Lanny—could have involved others; we weren't sure at the time. I wanted to repay Lanny's $9200. I did it in the form of a check. Did a promissory note with Lanny to repay this $9200 plus interest, $10,503.

Appendix A

Bailey gave the following testimony regarding Siegelman's involvement in this first step in the coverup:

Government: When you went to write this check to Lanny [Young] to disguise this earlier transaction, did you do that with the knowledge of the Governor?

Bailey: Yes.

Government: Did you talk to him about it before you did it?

Bailey: Yes.

Government: Was he in agreement with you doing that?

Bailey: Yes.

Government: When you talked to him about why you were going to do that, did you guys talk about the fact that this criminal investigation was going on?

Bailey: Yes.

Government: What were you and the Governor trying to accomplish when you wrote that check back to Lanny Young 17 months after that check had been written for $9200 to the Governor?

Bailey: To disguise the $9200 that went from Lanny to me to the Governor.

Young's testimony regarding the purported repayment was:

Government: Had you loaned Nick Bailey any money that would cause him to give you that $10,503 check?

Young: No.

Government: Well, what was going on when he wrote you that check, if you know?

Young: He was trying to make the $9200 look like a loan.

Bailey testified that the final step in the coverup was to give Siegelman a $2,793.35 check with the notation on it that it was "balance due on m/c" to make it appear that the check was Bailey's final payment for the motorcycle. His testimony about Siegelman's involvement in this step of the coverup was:

Government: What was going on here?

Bailey: We made a decision to finalize the agreement we made regarding the motorcycle early on, and this was to finish that. We met at the Governor's attorney's office and

with my attorney, and that's when I finished paying the Governor in full for the motorcycle to carry out the plan that we had entered into probably 12 to 18 months earlier.

Government: And what was that plan?

Bailey: To disguise the $9200 from Lanny to the Governor.

Finally, Bailey testified regarding his interview with the FBI regarding this meeting:

Government: Now, not long after [he gave the check to Siegelman] you had an occasion to be interviewed by federal and state criminal investigators, didn't you.

Bailey: Yes, sir.

Government: When they questioned you about this transaction on that occasion, did you tell them the truth about what had happened?

Bailey: No.

Government: Why not?

Bailey: There were a number of reasons; but primarily, I was still trying to protect myself and my boss.

The jury considered all of this testimony and found Siegelman guilty of the obstruction of justice charged in Count 17, but not in Count 16. This means that the jury decided, as a matter of fact, that Siegelman persuaded Bailey to write the check for $2973.35, but not the initial check for $10,500.

In evaluating the sufficiency of the evidence to support the jury's verdict, we are required to "view the evidence in the light most favorable to the government and resolve all reasonable inferences and credibility evaluations in favor of the jury's verdict." *United States v. Robertson*, 493 F.3d 1322, 1329 (11th Cir.2007). The evidence needs not "be wholly inconsistent with every conclusion except that of guilt, provided that a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt." *Id.* (internal quotation marks omitted).

A reasonable juror could have concluded that Siegelman persuaded Bailey (he asked and Bailey agreed) to take the final step in the cover up by giving him a $2793.35 check with the notation that it was final payment for the motorcycle. *See United States v. Tocco*, 135 F.3d 116, 126-27 (2d Cir.1998) (affirming jury inference of persuasion from defendant's strong influence over witness who was employee); *United States v. Morrison*, 98 F.3d 619, 629-30 (D.C.Cir.1996) (making

a request sufficient persuasion). The testimony was that Siegelman knew and agreed that Bailey would disguise Young's payment to Siegelman as a loan to Bailey to buy the motorcycle by "paying back" Young with his own check. The evidence further showed that Siegelman accepted and cashed the $2973.35 check from Bailey with the notation that it was final payment for the motorcycle. Finally, the jury had heard testimony that Bailey always did what Siegelman asked him to do.

The jury's acquittal on Count 16 shows that it was not convinced beyond a reasonable doubt that Siegelman instigated the coverup by directing Bailey to "pay back" Young with the initial $10,500 check. But by the time Bailey wrote the check to Siegelman for $2793.35, just over four months later, as a final step in the coverup, the jury's conviction on Count 17 indicates that it concluded Siegelman not only knew what Bailey was doing to coverup Young's corrupt payment, but that he was directing the coverup by persuading Bailey to write the check to him.

This sort of split verdict is itself evidence that the jury considered the charges carefully and individually, addressed the strength of the evidence on each charge, and reached a reasoned conclusion. *See United States v. Dominguez*, 226 F.3d 1235, 1248 (11th Cir.2000) (making these comments in the context of allegations of premature jury deliberations).

Siegelman's argument against the sufficiency of this evidence mirrors that he made against his convictions

on virtually all the other counts—that the evidence in this case was not perfect, that it relied too heavily on circumstances and required the jury to draw inferences from those circumstances that might have been drawn differently by different jurors.

But this is far too academic a view of trial by jury. In the absence of a defendant's confession or observation of his wrongdoing by a third person, proof by circumstantial evidence and the fair inferences to be drawn therefrom is both necessary and permissible. Siegelman's contention throughout his brief that "there was no evidence" to support a particular inference too often meant merely that there was no evidence other than Bailey or Young's testimony. While Siegelman may not approve that the testimony of coconspirators was sufficient to support the jury's findings of fact, the jury was free to disregard or disbelieve it. They believed it.

With respect to the "misleading" prong of the statute, the evidence was more than sufficient to support the jury's finding that the delivery of the final check in the presence of the two lawyers and the use of the lawyers to "finalize" the sale of the motorcycle to Bailey was an attempt to "create witnesses as part of a cover-up and to use unwitting third parties or entities to deflect the efforts of law enforcement agents in discovering the truth," *United States v. Veal*, 153 F.3d 1233, 1247 (11th Cir.1998) (statute satisfied by "the *possibility* or *likelihood* that [the defendants'] false and misleading information would be transferred to federal authorities . . ."). The jury was entitled to infer from the

sham check transaction in Bailey's lawyer's presence that Siegelman intended to mislead the lawyer into believing that the transaction was legitimate, that Bailey had, indeed, purchased the motorcycle from him, and that the check was final payment. As the "unwitting third party," the lawyer would be in a position factually to support the cover up since Siegelman clearly knew that there was a "possibility" that the federal investigators would come asking.[25]

4. *Admission of a Co-conspirator's Statement*

Defendants challenge the admission of Hanson's out-of-court statement to Martin at a HealthSouth retreat in the fall of 1999. Martin testified that Hanson "was bragging about the fact that he was able to get [HealthSouth] a spot on the CON Board with the help of the [IHS] check."

Under Fed.R.Evid. 801(d)(2)(E), a court has the discretion to admit coconspirator statements made during and in furtherance of the conspiracy. The court's admission of such statements is an abuse of its discretion to do so if the statements do not meet this legal standard. *United States v. Magluta*, 418 F.3d 1166 (11th Cir.2005).

This court applies a liberal standard in determining whether a statement was in furtherance of a conspiracy.

---

25. Indeed, the "bill of sale" for the motorcycle, prepared by the attorneys, was introduced at this trial. Similarly, Bailey had also delivered the "loan re-payment" check for $10,503.39 to Young in the office of Young's lawyer.

United States v. Santiago, 837 F.2d 1545, 1549 (11th Cir.1988). "The statement need not be necessary to the conspiracy, but must only further the interests of the conspiracy in some way." *United States v. Miles*, 290 F.3d 1341, 1351 (11th Cir.2002). "[I]f the statement 'could have been intended to affect future dealings between the parties,' then the statement is in furtherance of a conspiracy." *United States v. Caraza*, 843 F.2d 432, 436 (11th Cir.1988) (quoting *United States v. Patton*, 594 F.2d 444, 447 (5th Cir.1979)). Finally, "[s]tatements between conspirators which provide reassurance, serve to maintain trust and cohesiveness among them, or inform each other of the current status of the conspiracy further the ends of the conspiracy. . . ." *United States v. Ammar*, 714 F.2d 238, 252 (3d Cir.1983). Even defendants concede that boasting or bragging is in furtherance of a conspiracy if the statements are directed at obtaining the confidence or allaying the suspicions of coconspirators. *Santiago*, 837 F.2d at 1549.

Hanson's statement at the HealthSouth retreat furthered the conspiracy. We agree with the government that, given Martin's own involvement in the conspiracy (obtaining the IHS check), Hanson's bragging to him about purchasing the CON Board seat "with the help of" the IHS check informed Martin that their plan had worked and that Martin's involvement had helped. This alone is sufficient to permit its introduction under *Ammar*, 714 F.2d at 252. Additionally, however, the statement is easily seen to affect the coconspirators future dealings because Martin's assistance might be needed in connection with the second $250,000 donation

and Hanson knew this. Thus, Hanson's statement easily meets the *Caraza* standard. 843 F.2d at 436 (approving statement admitted after several acts of conspiracy helping to ensure final acts). The district court did not abuse its discretion in admitting this evidence.

5. *Juror Misconduct*

Defendants filed a joint motion for a new trial under Fed.R.Crim.P. 33(a), alleging juror misconduct by way of both juror exposure to extraneous information as well as by improper juror deliberation and that each impropriety violated the Sixth Amendment and requires a new trial.[26] After conducting two evidentiary hearings on this issue,[27] the district court held that no substantial violation of the Sixth Amendment occurred that required a new trial. We review the denial of a motion for new trial based on alleged juror misconduct for an abuse of discretion. *United States v. Venske*, 296 F.3d 1284, 1290 (11th Cir.2002).[28] We will consider each of the claims of misconduct in turn.

---

26. Scrushy has moved this court to appoint a special master under Fed. R.App. R. 48 to investigate the matter. The request is denied.

27. In the first of these hearing, the court considered the affidavit of Juror 5 to determine whether it established sufficient reason to conduct further inquiry, concluding that it did.

28. Of course, the district court's findings of facts supporting its legal conclusion are reviewed only for clear error. *United States v. Cuthel*, 903 F.2d 1381, 1383 (11th Cir.1990).

Appendix A

A. Juror Exposure to Extraneous Information

The Sixth Amendment to the United States Constitution guarantees the right to trial by an impartial jury. U.S. Const. amend. VI. To protect the right to an impartial jury, the Supreme Court has recognized that "[d]ue process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Smith v. Phillips*, 455 U.S. 209, 217, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). The jury must determine guilt solely on the basis of the evidence presented at trial and the court's instructions as to the applicable law. *Turner v. Louisiana*, 379 U.S. 466, 472-73, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965).

We presume, however, that the jury has been impartial. *United States v. Winkle*, 587 F.2d 705, 714 (5th Cir.1979).[29] A defendant who alleges denial of this right resulting from juror exposure to extraneous information has the burden of making a colorable showing that the exposure has, in fact, occurred. *Id. See also United States v. Ayarza-Garcia*, 819 F.2d 1043, 1051 (11th Cir.1987). If the defendant does so, prejudice to the defendant is presumed and the burden shifts to the government to show "that the jurors' consideration of extrinsic evidence was harmless to the defendant."

---

29. All decisions of the Fifth Circuit prior to October 1, 1981, when this court was established, have been adopted as decisions of this court. *Bonner v. Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981).

Remmer v. United States, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954); *United States v. Ronda*, 455 F.3d 1273, 1299 (11th Cir.2006).[30]

If the district court concludes the exposure to the extrinsic evidence was harmless to the defendant, on appeal, we review this conclusion for an abuse of discretion. *Id.* at 1296 n. 33. In doing so, we look at all the circumstances and we consider: (1) the nature of the extrinsic evidence; (2) the manner in which it reached the jury; (3) the factual findings in the district court and the manner of the court's inquiry into the juror issues; and, (4) the strength of the government's case. *Id.* at 1299-1300.

Defendants attached several exhibits to their motion regarding juror misconduct, including news articles after the trial and copies of affidavits by Juror 5 and his wife and his wife's pastor. This material, especially the affidavits of Juror 5, suggested that, during the trial, some of the jurors may have seen information about the trial on the internet.

Finding that the defendants had made a colorable showing of extrinsic influence on the jury, the district court held a hearing to which all twelve jurors were summoned and told to bring with them any material related to outside information that they or any other

---

30. *Ronda* recognized that there has been some inconsistency in our application of *Remmer*, but, as in *Ronda*, we decline to consider this issue because it has no bearing on the outcome. 455 F.3d at 1299 n. 36.

juror considered during trial or deliberations. At the hearing, the court asked each juror a series of twelve questions designed to reveal the nature and extent of any extrinsic evidence to which the jurors were exposed.[31] Each juror testified under oath in response to the twelve questions and follow-up questions.

Based upon this testimony, the district court found that there was credible evidence establishing that during deliberations some of the jurors were exposed to the following extrinsic evidence: (1) a copy of the Second Superseding Indictment obtained from the district court's own website; and (2) juror information from the website concerning the foreperson's obligation to preside over the jury's deliberations and to give every juror a fair opportunity to express his views.

1. *Exposure to a Book About the Role of the Foreperson*

As a matter of fact, and based upon the testimony given by the jurors in the hearing, the district court found that the extrinsic evidence accessed from the district court's own website by Juror 7 and mentioned by him in jury deliberations did not pertain to any substantive issue in defendants' trial. It concerned only the process of deliberation. Furthermore, it did not contradict any instruction given by the court, was consulted and discussed for only a few moments of a

---

31. These questions are attached as Exhibit "A" to this opinion.

more than five-day deliberation. It was discussed to encourage full participation by all the jurors. The district court concluded that the exposure of the jury to this extrinsic information was harmless to the defendants.

We agree. In substantially similar circumstances, we affirmed a district court's decision that a new trial was not required in a case where the jury foreman went to the library and checked out a book entitled *What You Need to Know for Jury Duty*, and then exposed the jury to it. *United States v. De La Vega*, 913 F.2d 861, 869 (11th Cir.1990). In that case, the foreperson read the book, implemented suggestions for jury procedures outlined in the book, brought the book to the jury room, and showed some other jurors a page in the book that outlined organizational steps for deliberation. *Id.* at 869-70. We held that the district court did not abuse its discretion in concluding that there was no reasonable possibility that the introduction of this extrinsic information prejudiced the defendants such that a new trial was required. *Id.* at 870-71.

The district court did not abuse its discretion in concluding that the introduction of similar information in this case was harmless beyond a reasonable doubt. The district court carefully investigated this matter. Its factual findings that this information was unrelated to the charges or any evidentiary matter in the case, and that it was introduced by a juror, not an outside influence, are not clearly erroneous. Furthermore, the district court held, and we agree, that the government's case was strong on the counts of conviction. In view of

these findings, we conclude that the district court did not abuse its discretion in holding that there was no reasonable possibility of prejudice to the defendants arising out of the exposure of the jury to this extrinsic evidence and denying the motion for a new trial.

2. *Exposure to the Unredacted Second Superseding Indictment*

During trial, the district court granted the government's motion to cure what the court had determined was mutiplicitous charging of the federal funds bribery counts by removing reference to Siegelman in Count 4 and to Scrushy in Count 3 of the Second Superseding Indictment.[32] The district court provided the jury with a copy of the resulting redacted Second Superseding Indictment for its deliberations.

Based upon its questioning of the jurors, the district court found that Juror 7 and Juror 40 accessed a copy of the unredacted Second Superseding Indictment early during the jury's deliberations. They each obtained the indictment from the court's website in order to be able to review the allegations outside of the jury deliberation room. Additionally, some other members of the jury became aware that Jurors 7 and 40 had spent time outside of the jury room reviewing the content of this document. While the jury did not discuss this fact at length, it did discuss it. There was no evidence, however,

---

32. The government had charged both in each count, thereby permitting each to be convicted twice for the same offense.

that any members of the jury other than Jurors 7 and 40 actually read the unredacted Second Superseding Indictment, or that either Juror 7 or Juror 40 ever realized that there was any difference between the two indictments.

The district court found that the two jurors had been exposed to the unredacted indictment, which was extrinsic information, and that other jurors had been exposed to the fact that those jurors had obtained a copy of the document from the internet. Considering the totality of the circumstances, including the substantial evidence of defendants' guilt on the counts of conviction, the district court concluded that the jury's exposure to this extrinsic information was harmless beyond a reasonable doubt and it denied them a new trial.

We agree. This extrinsic evidence was the charging document itself. The district court specifically found that, prior to the redaction, the jurors had been repeatedly exposed to comment by the court and all the parties on the contents of the Second Superseding Indictment. Exposure to the original indictment, including the duplicitous charging, was, therefore, innocuous and cumulative of information properly before the jury. The district court specifically found that the exposure of any juror to the unredacted indictment would not have provided that juror with factual information to which the juror did not already properly have access, nor would it have provided that juror with any legal knowledge different from that provided to the jury as a whole.

Furthermore, the jury was repeatedly instructed that the indictment was not evidence of guilt, and that it must decide the case solely on the evidence properly admitted during the trial. The jury is presumed to follow the district court's instructions. *See United States v. Shenberg*, 89 F.3d 1461, 1472 (11th Cir.1996).

Based upon the district court's investigation of this claim, its careful review of the nature, source and use of the extrinsic information in the context of the substantial evidence of defendants' guilt, we hold that the district court did not abuse its discretion in denying defendants a new trial for this reason.

3. *Exposure to Limited Portions of Media Coverage*

During the hearing, Jurors 7, 22, and 40 revealed that they had inadvertently experienced limited exposure to some media coverage during the trial. These jurors testified that, despite their best efforts, they had overheard snippets of television coverage or seen headlines regarding the case in newspapers or online. The court found that such limited, inadvertent exposure was not surprising given the intense media scrutiny of the trial. The court further found that the jurors' testimony was especially credible since it was clear to it that the jurors felt compelled to disclose even the most incidental and inadvertent exposure to extrinsic information. Juror 22 testified that she would leave the room or mute the television when the news came on, and Jurors 7 and 40, who saw headlines, testified that they did not read the accompanying stories prior to the

verdict. The court also found that there was no evidence that the jury discussed any media reports prior to the verdict.

Our review of the record supports these findings and the district court's conclusion that the exposure of these jurors to media reports about the trial was harmless. In view of the limited and incidental nature of this exposure and the substantial evidence of defendants' guilt on the counts of conviction, we hold that the district court did not abuse its discretion in denying the defendants a new trial for this reason.

B. Juror Deliberations

Defendants rely upon purported emails allegedly exchanged between jurors during trial and deliberations. Documents said to be copies of such exchanges were mailed anonymously to the defense, to argue that there was both premature jury deliberation and deliberation by fewer than all the jurors in this case, and that this improper deliberation denied the defendants of their Sixth Amendment right to an impartial jury.

These allegations posed a very different problem for the district court from those suggesting that the jury had been subject to external influences. District courts are subject to very stringent limitations on their authority to question jurors about their deliberations, and to use one or more juror's testimony to impeach the verdict of all. In fact, for nearly a century, the

Supreme Court has recognized a near-universal and firmly established common-law rule *flatly prohibiting* the use of juror testimony to impeach a verdict. *Tanner v. United States*, 483 U.S. 107, 117, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987); *McDonald v. Pless*, 238 U.S. 264, 35 S.Ct. 783, 59 L.Ed. 1300 (1915).

The Court has repeatedly emphasized the important policy considerations that require the shielding of juries from public scrutiny of their deliberations . *Williams v. Florida*, 399 U.S. 78, 100, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970). "The essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." *Id.* Because our system of justice so prizes this unique and essential feature of our criminal justice system, it both anticipates and tolerates some level of imperfection in the system. *United States v. D'Angelo*, 598 F.2d 1002, 1004-05 & n. 4 (5th Cir.1979).[33] As the Supreme Court has explained:

> There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or

33. For example, we permit logically inconsistent jury verdicts as to different counts, and even as to different co-defendants. We permit jury nullification. We do not inquire whether a verdict is the result of compromise, mistake or even carelessness.

> improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process. Moreover, full and frank discussions in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct.

Tanner, 483 U.S. at 120-21, 107 S.Ct. 2739 (internal citations omitted).

Permission to attack jury verdicts by postverdict interrogations of jurors would allow defendants to launch inquiries into jury conduct in the hope of discovering something that might invalidate the verdicts against them. "Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict." *Id.* at 119-20, 107 S.Ct. 2739 (quoting *McDonald*, 238 U.S. at 267-68, 35 S.Ct. 783). Such events would result in "the destruction of all frankness and freedom of discussion" in the jury room. *Id.* And, as early as 1892, the Supreme Court expressed concern that such postverdict investigation would "induce tampering with individual jurors subsequent to the verdict." *Mattox v. United States*, 146 U.S. 140, 149,

13 S.Ct. 50, 36 L.Ed. 917 (1892). In a justice system that depends upon public confidence in the jury's verdict, such events are unacceptable.

In an effort to protect the jury system, the Federal Rules of Evidence enshrine the common law rule against the admission of a juror's testimony to impeach the jury's verdict. Rule 606(b) provides:

> (b) **Inquiry into validity of verdict or indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Fed.R.Evid. 606(b).

By disallowing a juror to impeach the jury's verdict by testimony about their deliberations, the rule operates to protect jurors from postverdict investigation and to protect the verdict from endless attack.[34]

We have previously affirmed district courts that have denied motions for a new trial while declining to conduct investigations into jury deliberations. *Cuthel*, 903 F.2d at 1381. In *Cuthel*, we held that the district court did not abuse its discretion in failing to conduct an evidentiary hearing despite evidence of premature deliberations by the jury and evidence of intrajury pressure to reach a verdict. *Id.* at 1383; *see also United States v. Barshov*, 733 F.2d 842, 852 (11th Cir.1984) (duty to investigate arises only in the context of extrinsic influence); *McElroy by McElroy v. Firestone Tire & Rubber Co.*, 894 F.2d 1504, 1511 (11th Cir.1990) (denying defendant's requests to interview the jury members based on allegations of improper deliberations).

---

34. The only exception to the rule is to permit the sort of examination of jurors conducted by the district court in this case to determine whether the jury considered extrinsic information to the defendant's prejudice, as discussed in the immediately preceding portion of this opinion. The district court found as a matter of fact that it had "no doubt whatsoever that the documents purporting to be juror emails on which the Defendants rely are wholly unrelated to any evidence of jury exposure to extraneous information or outside influence." We conclude that this finding of fact is not clearly erroneous. In addition, we see no abuse of discretion in the way the district court dealt with the three other emails called to its attention after the evidentiary hearings.

The district court said that it had serious reservations about the authenticity of these purported emails, but concluded that the law barred it from questioning the jurors about their deliberations, or about the emails purporting to suggest that the jurors deliberated improperly.[85] Instead, it stated that "[e]ven if the Court were to assume *arguendo* the authenticity of these documents," it would not find that the emails established that the jury either deliberated prematurely or without all its members in any significant measure.

The court based this conclusion upon its factual findings that some of the emails might relate to discussion of the case prior to the submission of the case to the jury, that others might indicate limited deliberation by fewer than all the members of the jury, and that some indicate possible consideration of penalties faced by the defendants. According to the district court, this was the most that the emails showed.

The court concluded that, while "it is unquestionably clear that such discussions constitute misconduct, it is not the sort of conduct that this Court can or should directly inquire into by interrogating jurors, nor is it in this Court's view grounds for granting a new trial." Considering the totality of the circumstances, the

---

35. Defendants urged the court to obtain information regarding the emails from the jurors' internet providers but provided the court with no legal authority in support of this "unusual and intrusive investigation of jurors." In view of the law governing postverdict investigation of jurors, the court denied the request.

strength of the government's case, the length of jury deliberations, and the court's instructions to the jury, including the instructions not to decide or discuss the case prematurely, the district court held that there was no reasonable possibility that the defendants suffered prejudice from any premature deliberations, discussion of penalty, or deliberation with fewer than all the members of the jury present.

We agree. Additionally, we note that the verdict in this case was split in that Siegelman was acquitted of many of the charges.[36] Such a split verdict lends supports to a conclusion that the jury carefully weighed the evidence and reached a reasoned verdict free of undue influence and did not decide the case prematurely. *United States v. Dominguez*, 226 F.3d 1235, 1248 (11th Cir.2000); *Cuthel*, 903 F.2d at 1383.

We conclude, therefore, that the district court did not abuse its discretion in deciding that the purported emails, assuming they are authentic, do not entitle defendants to a new trial. The district court applied the relevant factors to the email evidence, and was well within its discretion to conclude that they did not demonstrate premature deliberation or deliberation

---

36. Scrushy argues that because he was convicted on all counts against him, that the verdict was not split as to him. The law, however, is to the contrary. *See United States v. Baker*, 432 F.3d 1189, 1237 (11th Cir.2005) (a split verdict is one in which the jury finds "guilt as to some defendants or charges but not as to others").

with fewer than all jury members sufficient to arise to a constitutional violation.[37]

6. *District Court Failure to Recuse*

Scrushy contends that he is entitled to a new trial because Chief Judge Fuller should have disclosed his "extraordinary extrajudicial income from business contracts with the United States Government pursuant to 28 U.S.C. § 455(a)." This claim is predicated upon Chief Judge Fuller's ownership interest in two aviation companies that engage in business with agencies of the United States government. This claim was raised over nine months after trial and incorporated information learned from the internet and from Chief Judge Fuller's Financial Disclosure Reports.

A motion for recusal based upon the appearance of partiality must be timely made when the facts upon which it relies are known. The untimeliness of such a motion is itself a basis upon which to deny it. *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1472 (11th Cir.1986). The rule has been applied when the facts upon which the motion relies are public knowledge, even if the movant does not know them. *See National Auto Brokers Corp. v. General Motors Corp.*, 572 F.2d 953, 957-59 (2d

37. Defendants moved just before oral argument for permission to file supplemental information regarding juror misconduct. At oral argument, the government represented to the court that its investigation into that misconduct did not involve the allegations of juror misconduct at issue in this appeal. For this reason, we shall deny the motion.

Cir.1978). The purpose of the rule is to "conserve judicial resources and prevent a litigant from waiting until an adverse decision has been handed down before moving to disqualify the judge." *Summers v. Singletary*, 119 F.3d 917, 921 (11th Cir.1997).

Scrushy's recusal motion was untimely, based upon information readily available to him prior to trial, and has all the earmarks of an eleventh-hour ploy based upon his dissatisfaction with the jury's verdict and the judge's post-trial rulings. It has no merit.

7. *Jury Selection Procedures*

Federal criminal defendants have both a statutory and a constitutional right to a grand and a petit jury selected at random from a fair cross-section of their community. Juror Selection and Service Act of 1968, 28 U.S.C. §§ 1861-1869 (the "JSSA"); U.S. Const. amend. VI. By its terms, the JSSA provides remedies for only a "substantial failure to comply" with its requirements for jury selection procedures that are random, objective, and that produce a jury that is a fair-cross section of the community. 28 U.S.C. § 1861 and 1867(d). Mere technical deviations from the JSSA's requirements do not violate the JSSA if they do not result in impermissible discrimination in the jury selection process. *United States v. Gregory*, 730 F.2d 692, 699 (11th Cir.1984).

Before their trial, both Siegelman and Scrushy filed virtually identical motions, alleging that the Middle

District of Alabama committed substantial violations of the JSSA in constructing its Qualified Jury Wheels in 2001 and 2005, and in the selection from those wheels of both their grand and petit juries. Defendants claimed that these violations resulted in their juries being not a fair-cross section of their community. Specifically, Scrushy and Siegelman challenged the Middle District's liberal deferral policy and its procedures for summoning previously deferred jurors, claiming that they resulted in juries that under-represented African-Americans. The district court denied these challenges. Defendants appeal this denial.

Recently, a panel of this court has upheld the jury selection procedures of the Middle District of Alabama in a case raising virtually the same claims as those asserted here. *United States v. Carmichael*, 560 F.3d 1270, No. 07-11400, 2009 WL 539953 (11th Cir. March 5, 2009). *Carmichael* held that the Middle District's jury selection procedures—including the liberal deferral policy and the procedures for summoning previously deferred jurors—did not substantially violate the JSSA. Additionally, *Carmichael* held that the Middle District's jury selection procedures did not result in the systematic under-representation of African-American jurors on the 2001 Qualified Jury Wheel or in the jury pools selected from that wheel. 560 F.3d at 1276.

In his brief, which Siegelman adopted, Scrushy acknowledges the identity between the claims presented in *Carmichael* and his claims presented here, conceding that "[b]ut for the fact that only the petit jury which

was drawn from the 2001 jury wheel was challenged there [the petit jury was drawn from the 2005 wheel here], the issues presented overlap." This is not surprising since the same expert who opined in *Carmichael* about alleged violations of the JSSA and the Constitution is relied upon here, using the same evidence in support of those claims. At the time defendants filed their pre-trial motion, however, *Carmichael* had not yet been decided. Now that it has, it disposes of their claims as to the 2001 jury wheel.

With respect to the 2005 wheel, the district court in this case held that defendants were not entitled to any relief because the challenged objectivity and randomness practices did not apply to that wheel. Additionally, the district court found that defendants had not shown the absolute racial disparity between the composition of his juries and the community at-large of over 10% that is required to establish a statutory or constitutional violation. *See Carmichael*, 560 F.3d at 1280; *see also United States v. Grisham*, 63 F.3d 1074, 1078-79 (11th Cir.1995). We agree.

Defendants' claims regarding the Middle District of Alabama's jury selection procedures are without merit and do not entitle them to any relief.

8. *Siegelman's Sentence*

Siegelman contends that the district court's decision to grant an upward departure under U.S.S.G. §§ 2C1.1 cmt. n.5, 5K2.0 (2002) violated the First Amendment and

18 U.S.C. § 3553(a) because it was allegedly based on Siegelman's statements criticizing the prosecutors in and the prosecution of this case. If this were true, we might agree.[38] It does not, however, accurately describe the district court's reasons for the upward departure.

In both its written motion for an upward departure and its arguments at sentencing, the government maintained that Siegelman's criminal conduct reflected such a systematic and pervasive corruption of the office of Governor and Lieutenant Governor, as well as various state agencies, such as the CON Board, as to cause a loss of public confidence in the government of the State of Alabama. The government's motion focused on this allegation of systematic and pervasive corruption of state government. The government contended that Siegelman "for over six years abused the Executive Branch of the state of Alabama."

The statute permits and the cases relied upon by the government uphold upward departures where the district court finds that there was pervasive corruption of a governmental function resulting in a loss of public confidence in state or local government. *See* U.S.S.G. §§ 2C1.1 cmt. n.5, 5K2.0; *United States v. Shenberg*, 89 F.3d 1461, 1476-77 (11th Cir.1996); *United States v. Reyes*, 239 F.3d 722, 744-45 (5th Cir.2001).

---

38. The government argues persuasively that, even if there was error here, it was harmless as the departure did not affect Siegelman's ultimate sentence. As we need not, we do not reach this argument.

Although the government did refer at sentencing to Siegelman's very public criticisms of the federal criminal justice system, including complaints of selective prosecution, there is no indication that the court based its upward departure decision on these attacks. In replying to Siegelman's counsel statement about saving the issue of alleged selective prosecution for another day, the court responded, "Then let's do that."

In considering the request for an upward departure "as set forth in the Government's motion," the district court found that Siegelman's conduct resulted in a loss of public confidence in the executive branch of Alabama government. The district court took judicial notice of the "plethora of media attention" to the case by the local and national media, and relied on this in finding that the case had severely undermined public confidence in Alabama state government.

Siegelman does not contend that an upward departure for his systematic and pervasive corruption of state government was inappropriate, and even his attorney at sentencing conceded that "certainly the argument could be made, in all candor, that there could be some question as to public confidence in this case."

The district court expressly stated that it was upwardly departing in order to "preserve the integrity of the judiciary and the confidence of the people of the state of Alabama in its elected officials." We find no abuse of discretion in the district court's upward departure in sentencing Siegelman.

IV.

For the foregoing reasons, we conclude that Scrushy's convictions and sentence are due to be AFFIRMED. Siegelman's convictions on Counts 8 and 9 are due to be REVERSED. Siegelman's remaining convictions are due to be AFFIRMED. Siegelman's sentence is due to be VACATED in the light of our reversal of his convictions on Counts 8 and 9 of the indictment, and his case is remanded for resentencing.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED. All pending motions in this case are DENIED.

Appendix A

Exhibit A

First question: Did anyone other than another juror try to influence your thinking about this case or your vote on the substantive counts against any Defendant?

Second question: Do you have any reason to believe that any juror was subjected to attempts to influence his or her thinking about the case by anyone other than another juror?

Third question: Did anyone other than another juror attempt to discuss the case with you during the time you were a juror in this case?

Fourth question: During the time that you were serving as a juror did you view any news reports or other information relating to this case or to any Defendant from sources such as newspapers, magazine, radio, or television broadcasts or Internet sites?

Fifth question: During the time that you were serving as a juror did you view any materials from any books, newspapers, Internet sites or any other source relating to any witness, any legal issue, or any factual issue related to this case?

Sixth question: During the time that you were serving as a juror did you in any way attempt to independently investigate any facts or law relating to this case?

Appendix A

Seventh question: During the time that you were serving as a juror did you overhear any conversations between persons not on the jury or between non-jurors as to any member of the jury relating to this case?

Eighth question: During the time that you were serving as a juror did you view or hear any extraneous information about the penalty that might be applicable to any Defendant if he was convicted of the charges in this case?

Ninth question: During the time that you were serving as a juror did you obtain extraneous information from any source about your role as a juror, your jury service generally, or the role of the foreperson?

Tenth question: During the time that you served as a juror did any other juror say or do anything that caused you to believe that he or she may have been exposed to extraneous information as I have defined it about this case from any source?

Eleventh question: During the time that you were serving as a juror did you view or hear any extraneous information about either the law applicable to this case or any factual material relating to this case?

Twelfth question: Did you bring any documents in response to the subpoena relating to extraneous information?

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITIONS FOR REHEARING FILED MAY 14, 2009

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 07-13163-BB

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DON EUGENE SIEGELMAN,
RICHARD SCRUSHY,

Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Alabama

Before: EDMONDSON, Chief Judge, TJOFLAT and HILL, Circuit Judges.

PER CURIAM:

The Petitions for Rehearing are DENIED. The Government's letter of March 11, 2009, regarding footnote 37, which the Court construes as a request for clarification, is also DENIED, as the footnote is

consistent with the Government's recollection of oral argument. No Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Fed. R. App. Pro.), the Petitions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ James C. Hill
UNITED STATES CIRCUIT JUDGE

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
NOV 13 2009
OFFICE OF THE CLERK

Nos. 09-167 and 09-182

In the Supreme Court of the United States

RICHARD M. SCRUSHY, PETITIONER

v.

UNITED STATES OF AMERICA

DON EUGENE SIEGELMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
JOHN-ALEX ROMANO
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. In *McCormick* v. *United States*, 500 U.S. 257, 273 (1991), the Court held that, to sustain Hobbs Act extortion convictions based on an official's receipt of campaign contributions in exchange for official action, the payments must be "in return for an explicit promise or undertaking by the official to perform or not to perform an official act." The question presented is whether petitioners' convictions for honest-services mail fraud, bribery, and conspiracy are valid absent an instruction requiring the jury to find, and absent direct proof of, an express agreement to exchange campaign contributions for specific official action.

2. Whether the jury could rationally conclude from the evidence that petitioner Siegelman obstructed justice.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 2
Statement 2
Argument 14
Conclusion 32

TABLE OF AUTHORITIES

Cases:

American Commc'ns Ass'n v. *Douds*, 339 U.S. 382 (1950) 21
Evans v. *United States*, 504 U.S. 255 (1992) ..... *passim*
Hamling v. *United States*, 418 U.S. 87 (1974) 24
Major League Baseball Players Ass'n v. *Garvey*, 532 U.S. 504 (2001) 27
McCormick v. *United States*, 500 U.S. 257 (1991) .. *passim*
Skilling v. *United States*, cert. granted, No. 08-1394 (Oct. 13, 2009) 26
United States v. *Abbey*, 560 F.3d 513 (6th Cir. 2009), petition for cert. pending, No. 09-5496 (filed July 20, 2009) 16
United States v. *Allen*, 10 F.3d 405 (7th Cir. 1993) 25
United States v. *Antico*, 275 F.3d 245 (3d Cir. 2001), cert. denied, 537 U.S. 821 (2002) 17
United States v. *Applewhaite*, 195 F.3d 679 (3d Cir. 1999) 31
United States v. *Blandford*, 33 F.3d 685 (6th Cir. 1994), cert. denied, 514 U.S. 1095 (1995) 20, 22
United States v. *Carpenter*, 961 F.2d 824 (9th Cir.), cert. denied, 506 U.S. 919 (1992) 15, 22, 23

Cases—Continued: Page

United States v. *Ford*, 435 F.3d 204 (2d Cir. 2006) 25
United States v. *Ganim*, 510 F.3d 134 (2d Cir. 2007), cert. denied, 128 S. Ct. 1911 (2008) 16
United States v. *Genao*, 343 F.3d 578 (2d Cir. 2003) .. 31, 32
United States v. *Hertular*, 562 F.3d 433 (2d Cir. 2009) 31, 32
United States v. *Inzunza*, 580 F.3d 894 (9th Cir. 2009) 15, 22
United States v. *Jackson*, 72 F.3d 1370 (9th Cir. 1995), cert. denied, 517 U.S. 1157 1996) 25
United States v. *Kincaid-Chauncey*, 556 F.3d 923 (9th Cir. 2009), petition for cert. pending, No. 09-5076 (filed June 29, 2009) 15, 16
United States v. *McDowell*, 250 F.3d 1354 (11th Cir. 2001) 24
United States v. *Powell*, 469 U.S. 57 (1984) 24
United States v. *Romero*, 54 F.3d 56 (2d Cir. 1995), cert. denied, 517 U.S. 1149 (1996) 30
United States v. *Taylor*, 993 F.2d 382 (4th Cir.), cert. denied, 510 U.S. 891 (1993) 17
United States v. *Veal*, 153 F.3d 1233 (11th Cir. 1998), cert. denied, 526 U.S. 1147 (1999) 13, 28, 31
United States v. *Williams*, 128 S. Ct. 1830 (2008) 20, 26

Constitution and statutes:

U.S. Const. Amend. I 23, 24, 25
Hobbs Act, 18 U.S.C. 1951 9
18 U.S.C. 1951(a) 24
18 U.S.C. 1951(b)(2) 9, 24

Statutes—Continued: Page

18 U.S.C. 371 ..... 2, 8
18 U.S.C. 666 2
18 U.S.C. 666(a)(1)(B) 8, 25
18 U.S.C. 1341 ..... 2, 8
18 U.S.C. 1346 ..... 2, 8
18 U.S.C. 1512(a)(1)(C) 30
18 U.S.C. 1512(b)(3) ..... *passim*

In the Supreme Court of the United States

No. 09-167

RICHARD M. SCRUSHY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 09-182

DON EUGENE SIEGELMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-67a) is reported at 561 F.3d 1215.[1]

[1] Citations to "Pet." and "Pet. App." refer to the petition and petition appendix in No. 09-167.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 2009. Petitions for rehearing were denied on May 14, 2009 (Pet. App. 70a). The petitions for a writ of certiorari were filed on August 10, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Alabama, petitioners were convicted of one count of federal-funds bribery, in violation of 18 U.S.C. 666; one count of conspiring to commit honest-services mail fraud, in violation of 18 U.S.C. 371; and four counts of honest-services mail fraud, in violation of 18 U.S.C. 1341 and 1346. Petitioner Siegelman was also convicted of one count of obstructing justice, in violation of 18 U.S.C. 1512(b)(3). Pet. App. 2a. The district court sentenced Siegelman to 88 months of imprisonment, to be followed by three years of supervised release, and sentenced petitioner Scrushy to 82 months of imprisonment, to be followed by three years of supervised release. The court also ordered Scrushy to pay a $150,000 fine and $267,000 in restitution. Siegelman Judgment 2-3; Scrushy Judgment 2-5. The court of appeals affirmed Scrushy's convictions, reversed Siegelman's convictions on two mail fraud counts, affirmed his remaining convictions, vacated Siegelman's sentence, and remanded his case for resentencing. Pet. App. 67a.

1. a. In 1998, Siegelman was elected Governor of Alabama. He had campaigned in favor of establishing a state lottery to help fund education. After his election, Siegelman established the Alabama Education Lottery Foundation (AELF) to raise money to campaign for

approval of the lottery by ballot initiative. The initiative appeared on the October 1999 ballot and was defeated. Pet. App. 4a.

Scrushy is the founder and former Chief Executive Officer of HealthSouth Corp., a major hospital corporation with operations throughout Alabama. Under previous governors, Scrushy had served on a state health-care panel—the Certificate of Need Review Board (CON Board)—that determines the number of health-care facilities in the State and therefore was important to Scrushy, HealthSouth, and its competitors. The governor has the sole discretion to appoint and remove members of the CON Board. Pet. App. 2a, 5a; Gov't C.A. Br. 4, 6-7.

Nick Bailey was Siegelman's closest confidential assistant. After the 1998 election, Bailey was present when Siegelman met with Eric Hanson, an outside lobbyist for HealthSouth. Pet. App. 5a-6a. Siegelman told Hanson that because Scrushy had contributed at least $350,000 to Siegelman's opponent in the election, Scrushy needed to "do" at least $500,000 in order to "make it right" with the Siegelman campaign. *Id.* at 6a. Bailey testified that Siegelman was referring to the lottery campaign and that Hanson was to relay this conversation to Scrushy. *Id.* at 5a-6a; Gov't C.A. Br. 8. Bailey also testified that Hanson subsequently told Bailey that Scrushy wanted control of the CON Board and "made it clear to him that if Mr. Scrushy gave the $500,000 to the lottery campaign that [they] could not let him down" with respect to the CON Board seat. Pet. App. 6a. Bailey periodically reminded Siegelman of their conversations "with Eric Hanson about what Mr. Scrushy wanted for his contributions, and that was the CON Board." *Id.* at 7a.

Scrushy told Mike Martin, then Chief Financial Officer of HealthSouth, that to "'have some influence or a spot on the CON Board,'" they would have to help Siegelman raise money for the lottery campaign. Pet. App. 6a. If they did so, Scrushy said, "[they] would be assured a seat on the CON Board." *Ibid.* (brackets in original). Martin testified that "'[they] were making a contribution . . . in exchange for a spot on the CON Board.'" *Ibid.*

Scrushy, however, did not want the contribution to come directly from himself or HealthSouth, so he instructed Martin to ask HealthSouth's investment banker, Bill McGahan of UBS, to make the contribution. Pet. App. 7a. McGahan did not want UBS to make the requested contribution because its size was "out of the norm," but he was pressured into doing so by Martin and Scrushy. *Ibid.* Accordingly, McGahan arranged for one of UBS's clients—Integrated Health Services of Maryland (IHS)—to pay $250,000 to the AELF in exchange for a reduction of $267,000 in the fee that IHS owed UBS. IHS then issued a check payable to the AELF (the IHS check). Scrushy told Martin that it was important that he, Scrushy, hand-deliver the check to Siegelman, so Martin gave the IHS check to Scrushy. *Id.* at 7a-8a.

Siegelman and Scrushy subsequently met in Siegelman's office. Bailey testified that, at some point after the meeting, Siegelman showed Bailey the IHS check and said that Scrushy was "'halfway there.'" Pet. App. 8a. Bailey asked, "'what in the world is he [Scrushy] going to want for that?'" *Ibid.* (brackets in original) . Siegelman replied, "'[T]he CON Board.'" *Ibid.* Bailey responded, "'I wouldn't think that would be a problem,

would it?'" *Ibid.* Siegelman replied, "'I wouldn't think so.'" *Ibid.*; see also Gov't C.A. Br. 12-13, 70 n.18.

On July 26, 1999—one week after the date on the IHS check—Siegelman appointed Scrushy to the CON Board. Through Bailey, Siegelman informed the chair-designate of the CON Board that he wanted Scrushy appointed vice-chair, and the CON Board complied. Pet. App. 8a-9a. Bailey testified that Siegelman made Scrushy vice-chair "'[b]ecause [Scrushy] asked for it.'" *Ibid.* (brackets in original).

Siegelman gave the IHS check to Darren Cline, the AELF's fundraising director, and said that it was from Scrushy. Cline expressed concern about the size of the donation (which he saw as "'colossal'" coming from one person); Siegelman, who "called the shots" on the lottery campaign, told Cline to hold the check. Gov't C.A. Br. 15-16; Pet. App. 4a. After the election, however, at Siegelman's direction, Bailey retrieved the check and, without telling Cline, deposited it in a newly opened checking account in the name of the Alabama Education Foundation (AEF), the AELF's successor. *Id.* at 9a; see also Gov't C.A. Br. 16.

On March 9, 2000, the AEF took out a loan, from the same bank that provided the checking account, in order to pay off debt incurred by the Alabama Democratic Party for get-out-the-vote expenses in connection with the lottery referendum; Siegelman and another individual personally and unconditionally guaranteed the loan to the AEF. At that time, the AEF had over $447,000 in its account, $250,000 of which came from the IHS check. On March 13, 2000, the AEF withdrew $440,000 from the account to pay down its loan. Pet. App. 9a; Gov't C.A. Br. 17-18.

In May 2000, Siegelman and Bailey met privately with Scrushy in Scrushy's office. Scrushy gave Siegelman a HealthSouth check for $250,000 payable to the AEF (the HealthSouth check). On May 23, 2000, the HealthSouth check was applied directly against the balance on the AEF's loan. Pet. App. 10a.

In January 2001, Scrushy resigned from the CON Board. Siegelman immediately appointed HealthSouth Vice-President Thom Carman to serve the remainder of Scrushy's term. He subsequently reappointed Carman to a full term. While Carman was serving on the Board, HealthSouth applied for and obtained Certificates of Need for a mobile PET scanner and a rehabilitation hospital. Pet. App. 9a.

The AEF did not timely disclose receipt of either the IHS or the HealthSouth check. Neither the AEF's preelection disclosure statements for the period including July 19, 1999, nor the AEF's annual report for 1999 disclosed the IHS check, and the AEF filed no disclosure statements for 2000 at all. Thereafter, an Alabama newspaper questioned whether the AEF had properly reported its financial dealings with the state Democratic Party, and the Secretary of State's Office contacted the state Attorney General's Office about the AEF's failure to disclose the payoff of the state party's loan. Subsequently, in July 2002, the AEF filed an amended annual report for 1999 and an annual report for 2000, which disclosed the IHS and HealthSouth checks (and other previously undisclosed contributions). Pet. App. 10a; Gov't C.A. Br. 18-20.

b. Lanny Young was a long-time friend of Siegelman's with various business dealings. Young and Bailey testified that, for many years, Young, Bailey, Siegelman, and Paul Hamrick (Siegelman's chief of staff) had a pay-

for-play agreement whereby Young would provide the others with money, campaign contributions, and other benefits in return for official action, as needed, to benefit Young's business interests. Pet. App. 10a-11a; Gov't C.A. Br. 24-25.

In January 2000, Siegelman asked Young to give him $9200 to buy a motorcycle; Siegelman, in fact, had already purchased the motorcycle for $12,173.35. Siegelman told Young to work out the details of the $9200 payment with Bailey. Young then obtained a cashier's check for $9200 made payable to Bailey and gave it to him. Bailey, in turn, gave Siegelman's secretary a $9200 check payable to Siegelman's wife, which was deposited into Siegelman's account that day. But for the deposit, Siegelman's fourth-quarter income-tax payment would not have cleared. Pet. App. 11a; Gov't C.A. Br. 26-27.

In June 2001, Siegelman was aware that federal and state authorities were investigating his dealings with Young. On June 5, 2001, Bailey wrote Young a check for $10,503.39 bearing the notation "repayment of loan plus interest." Gov't C.A. Br. 28; see Pet. App. 11a. Young and Bailey each testified that the purpose of that check was "to cover it [the $9200 payment] up" by making it appear that Bailey earlier had borrowed the $9200 from Young. Gov't C.A. Br. 28. Bailey testified that he had no intention of buying the motorcycle when he wrote the $10,503.39 check to Young, of which Siegelman knew and approved. *Ibid.* Bailey also wrote a check for $2973.35 to Siegelman bearing the notation "balance due on m/c" to provide a reason for Bailey having borrowed money from Young—to purchase a motorcycle from Siegelman. Pet. App. 11a; see Gov't C.A. Br. 28-29.

Bailey gave Siegelman the $2973.35 check in the presence of his own attorney and Siegelman's. Siegel-

man accepted Bailey's check and gave Bailey a bill of sale for the motorcycle, which the attorneys helped finalize. Neither lawyer was told that the purpose of the transaction was to help cover up the $9200 payment from Young to Siegelman. Bailey testified that he lied about the transaction to the attorneys, that he and Siegelman were aware of the investigation at this time, and that he later lied about the transaction to federal investigators to protect himself and Siegelman. Pet. App. 12a.

2. A grand jury sitting in the Middle District of Alabama returned a second superseding indictment against Siegelman, Scrushy, and others. Of the 34 counts alleged, several related to the CON Board scheme: Siegelman and Scrushy were charged with federal-funds bribery, in violation of 18 U.S.C. 666(a)(1)(B) (Siegelman in Count 3, Scrushy in Count 4);[2] conspiracy to commit honest-services mail fraud, in violation of 18 U.S.C. 371 (Count 5); and honest-services mail fraud, in violation of 18 U.S.C. 1341 and 1346 (Counts 6-9). Siegelman was also charged with obstructing justice, in violation of 18 U.S.C. 1512(b)(3) (Counts 16-17), for his role in covering up the $9200 payment from Young to Siegelman. Pet. App. 12a-13a; Second Superseding Indictment 29-36, 39-40. The remaining counts against Siegelman charged him and others with RICO offenses and various other offenses arising from conduct unrelated to the CON Board scheme or the cover-up of the payment. *Id.* at 2-29, 36-39, 41-43.

---

[2] The Second Superseding Indictment originally charged Siegelman and Scrushy in both bribery counts (Counts 3 and 4), but before verdict, the district court ordered the government to proceed on only one bribery count as to each defendant. Gov't C.A. Br. 3 n.1.

3. At trial, petitioners requested a *quid pro quo* instruction on, *inter alia*, the counts related to the CON Board scheme. They based their request on *McCormick* v. *United States*, 500 U.S. 257 (1991), in which the Court held that a public official's receipt of campaign contributions is subject to prosecution under the Hobbs Act, 18 U.S.C. 1951, as extortion "under color of official right," 18 U.S.C. 1951(b)(2), "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." 500 U.S. at 273. "In such situations," the Court explained, "the official asserts that his official conduct will be controlled by the terms of the promise or undertaking." *Ibid.*

The district court supplemented its instructions on the bribery counts as follows: "A defendant does not commit a crime by giving something of value to a governmental official unless the defendant and the official agree that the official will take specific action in exchange for the thing of value." 09-182 Pet. App. 64a. The district court also supplemented its instructions on the honest-services fraud counts by instructing the jury that to convict "you must find not only that the defendants intended to deprive the public of their honest services, but also that they intended to deceive the public and that they intended to alter their official actions as a result of the receipt of campaign contributions or other benefits." *Id.* at 63a. Petitioners objected that the supplemental instructions were inadequate because they did not require the jury to find an express agreement. Trial Tr. 7320-7324, 7329.

On June 29, 2006, the jury found both petitioners guilty on all of the bribery, fraud, and conspiracy to commit fraud counts related to the CON Board scheme,

and it found Siegelman guilty on the obstruction count relating to the $2973.35 check (Count 17). The jury acquitted Siegelman on the remaining counts and acquitted the other two defendants on all counts. Pet. App. 13a. The district court denied petitioners' post-verdict motions for judgment of acquittal and for a new trial. 09-182 Pet. App. 65a-72a.

4. The court of appeals affirmed Scrushy's convictions, reversed Siegelman's convictions on two fraud counts, affirmed his remaining convictions, vacated Siegelman's sentence, and remanded his case for resentencing. Pet. App. 1a-69a.

a. Petitioners contended that the holding of *McCormick*, interpreting the Hobbs Act to require proof of a *quid pro quo*, was equally applicable to their prosecution for bribery, conspiracy, and honest-services mail fraud. They further contended that the district court failed to give an adequate *quid pro quo* instruction. The court of appeals did not definitively resolve whether *McCormick* applies in this context, because "whether or not a quid pro quo instruction was legally required, such an instruction was given." Pet. App. 18a.

The court of appeals noted that the bribery instructions had required the jury to find that petitioners had "*agree[d]*" to exchange "specific action" (the CON Board appointment) for the "thing of value" ($500,000 to the lottery campaign). Pet. App. 18a. The court held that instruction to be adequate and rejected petitioners' contention that the "agreement had to be *express*." *Ibid.* The court relied on *Evans* v. *United States*, 504 U.S. 255 (1992), in which this Court held that a jury instruction that did not require an "express" *quid pro quo*, but did require that acceptance of the campaign contribution be in return for specific official action, satisfied *McCor-*

mick. Pet. App. 18a-19a (discussing *Evans*, 504 U.S. at 258, 268). Here, the instruction that required an agreement covering specific action, the court of appeals explained, prevented prosecution of a campaign contribution based on only a "generalized expectation of some future favorable action." *Id.* at 19a. The court rejected a requirement that the agreement be memorialized in writing or, as petitioners had suggested, "overheard by a third party"; "[s]ince the agreement is for some specific action or inaction, the agreement must be *explicit*, but there is no requirement that it be *express*." *Id.* at 20a. The court also stated that "an explicit agreement may be 'implied from [the official's] words and actions.'" *Ibid.* (quoting *Evans*, 504 U.S. at 274 (Kennedy, J., concurring in part and concurring in the judgment) (brackets in original)).

As to the conspiracy and substantive honest-services counts, the court concluded that any failure to adequately instruct the jury on a *quid pro quo* requirement was harmless in light of the *quid pro quo* instruction on the bribery counts. Pet. App. 21a n.17.

b. The court held that the evidence was sufficient to prove an explicit *quid pro quo*. Pet. App. 22a-26a. The court found that Bailey's testimony about his July 1999 conversation with Siegelman, in which Siegelman showed him the IHS check and stated, *inter alia*, that Scrushy was halfway to $500,000 and wanted an appointment to the CON Board, see p. 4, *supra*, "was competent evidence that Siegelman and Scrushy had agreed to a deal in which Scrushy's donation would be rewarded with a seat on the CON Board." Pet. App. 24a. The court also found probative evidence of petitioners' illicit *quid pro quo* in: Bailey's repeated testimony that petitioners had an explicit agreement to exchange money for

a seat on the CON Board; Bailey's testimony about Siegelman's solicitation of the $500,000 payment through Hanson; Martin's corroborating testimony that the contribution was in exchange for the CON Board seat; Martin's testimony that Hanson once bragged about getting HealthSouth a CON Board seat with the help of the IHS check; Cline's testimony that the IHS check was from Scrushy, that "another $250,000 * * * would be coming," and that receipt of the checks was not reported until after the AEF's finances came under scrutiny; McGahan's testimony about Scrushy's solicitation of the first contribution from him; testimony from the HealthSouth lawyer responsible for HealthSouth political contributions that she was told nothing about the $500,000 in contributions; and "the close relationship in time between the first check and Siegelman's appointment of Scrushy" to the CON Board. *Id.* at 25a, 26a; see *id.* at 24a-26a.

c. The court held that the evidence was insufficient to support Siegelman's mail fraud convictions on Counts 8 and 9, which were based on Scrushy's use of the corruptly obtained CON Board seat to further HealthSouth's interests. The court found no evidence from which the jury could infer that Siegelman knowingly had agreed to a scheme to defraud that included, not only his appointment of Scrushy to the CON Board for $500,000, but also Scrushy's self-dealing once on the CON Board. Pet. App. 26a-33a.

d. The court held that the evidence was sufficient to support Siegelman's conviction for obstructing justice. Count 17 alleged two separate bases for Siegelman's violation of 18 U.S.C. 1512(b)(3): that, with intent to hinder, delay, or prevent the communication of information to the FBI about offenses related to the $9200 pay-

ment, Siegelman corruptly persuaded Bailey to write and give him a check for $2973.35 with the false notation "balance due on m/c"; and that Siegelman engaged in misleading conduct toward another person. The court found the evidence sufficient to support conviction under either prong. Pet. App. 36a-44a.

With respect to corrupt persuasion, the court stated that the evidence showed that "Siegelman knew and agreed that Bailey would disguise Young's payment to Siegelman as a loan to Bailey to buy the motorcycle by 'paying back' Young with his own check," and that Siegelman had accepted and cashed the $2973.35 check with the notation that it was the final payment on the motorcycle. Pet. App. 42a. The jury also heard testimony that "Bailey always did what Siegelman asked him to do." *Ibid.* The court found that the jury's decision to acquit Siegelman on Count 16, which charged him with corruptly persuading Bailey to write the $10,503.39 check, showed that the jury had carefully considered the obstruction charges, and had concluded that "by the time Bailey wrote the check to Siegelman for $2793.35 [*sic*], just over four months later, as a final step in the coverup," Siegelman "was directing the coverup by persuading Bailey to write the check to him." *Ibid.*

With respect to misleading conduct, the court found "the evidence * * * more than sufficient to support the jury's finding that the delivery of the final check in the presence of the two lawyers and the use of the lawyers to 'finalize' the sale of the motorcycle to Bailey was an attempt to 'create witnesses as part of a coverup and to use unwitting third parties or entities to deflect the efforts of law enforcement agents in discovering the truth.'" Pet. App. 43a (quoting *United States* v. *Veal*, 153 F.3d 1233, 1247 (11th Cir. 1998), cert. denied, 526

U.S. 1147 (1999)). The jury reasonably could infer, the court explained, that Siegelman "intended to mislead the lawyer into believing that the transaction was legitimate," *i.e.*, that Bailey had, all along, been purchasing the motorcycle from Siegelman. *Id.* at 44a. "As the 'unwitting third party,'" the court concluded, "the lawyer would be in a position factually to support the cover up since Siegelman clearly knew that there was a 'possibility' that the federal investigators would come asking." *Ibid.*[3]

ARGUMENT

1. Petitioners, supported by Siegelman's amici, renew their argument (Pet. 10-17; 09-182 Pet. 11-23) that *McCormick* v. *United States*, 500 U.S. 257 (1991), requires proof of an "express" *quid pro quo* and that the *quid pro quo* may not be implied from circumstantial evidence. Those contentions lack merit, and the court of appeals' resolution of those issues does not warrant further review.

a. Contrary to petitioners' contentions (Pet. 13-17; 09-182 Pet. 13-16, 20, 22), the decision below does not conflict with that of any other circuit. None of the decisions that petitioners cite supports the proposition that a heightened standard of "explicit" proof is required in campaign-contribution cases. Indeed, as Siegelman effectively concedes (09-182 Pet. 22), the cases on which petitioners rely did not involve campaign contributions at all.

The Ninth Circuit has long since rejected the requirement of a "verbally explicit" *quid pro quo* that peti-

---

[3] The court of appeals also denied relief on petitioners' remaining claims, none of which petitioners present here. See Pet. App. 34a-35a, 44a-66a.

tioners urge here. *United States* v. *Carpenter*, 961 F.2d 824, 827 (9th Cir.), cert. denied, 506 U.S. 919 (1992). In reviewing the sufficiency of the evidence supporting a state senator's conviction for accepting and soliciting campaign contributions, *id.* at 825, the Ninth Circuit explained (even before *Evans* v. *United States*, 504 U.S. 255 (1992)) that "what *McCormick* requires is that the quid pro quo be clear and unambiguous, leaving no uncertainty about the terms of the bargain." *Id.* at 827. Moreover, "[t]he jury may consider both direct and circumstantial evidence, including the context in which a conversation took place, to determine if there was a meeting of the minds on a quid pro quo." *Ibid.* *Carpenter* makes clear that in the Ninth Circuit, the understanding between official and contributor "need not be verbally explicit." *Ibid.*

Since the petitions were filed, the Ninth Circuit has confirmed that it adheres to *Carpenter*. That court recently reiterated: "An official may be convicted without evidence equivalent to a statement such as: 'Thank you for the $10,000 campaign contribution. *In return for it*, I promise to introduce your bill tomorrow.'" *United States* v. *Inzunza*, 580 F.3d 894, 900 (2009). Rather, "the proof may be circumstantial." *Id.* at 901. The Eleventh Circuit's holding that an explicit agreement for a public official to exchange specific action for a campaign contribution can be established even if not shown to be express, Pet. App. 17a, is fully consistent with the Ninth Circuit's description of the requirements for an explicit *quid pro quo*.

The decision in *United States* v. *Kincaid-Chauncey*, 556 F.3d 923 (9th Cir. 2009), petition for cert. pending, No. 09-5076 (filed June 29, 2009), does not announce a different rule for campaign-contribution cases. In-

deed, as noted above, *Kincaid-Chauncey* did not involve campaign contributions at all. See *id.* at 927-929.[4] Siegelman's suggestion (09-182 Pet. 22) that dictum in *Kincaid-Chauncey* could nonetheless justify review on the theory that it might deter prosecution in future campaign-contribution cases is without merit, as the subsequent decision in *Inzunza* illustrates.

Similarly, the Second and Sixth Circuit decisions that petitioners cite do not establish any conflict. Those cases, like *Kincaid-Chauncey*, did not involve campaign contributions. See *United States* v. *Abbey*, 560 F.3d 513, 515, 518 (6th Cir. 2009), petition for cert. pending, No. 09-5496 (filed July 20, 2009); *United States* v. *Ganim*, 510 F.3d 134, 137-140 (2d Cir. 2007) (Sotomayor, J.), cert. denied, 128 S. Ct. 1911 (2008). Although each case made passing references to the campaign-contribution context, those references were dicta; neither case can be read to establish a heightened "express" standard in that context. And both cases seemed to base the contrast between campaign-contribution cases and cases involving other types of payments on whether there must be an explicit promise to perform a "particular act" (*Ganim*, 510 F.3d at 144) or "particular, identifiable act" (*Abbey*, 560 F.3d at 518) at the time of payment in a campaign-contribution context, as opposed to the official's understanding that he was expected to benefit the payor "as specific opportunities arose" (*Ganim*, 510 F.3d at 144; *Abbey*, 560 F.3d at 518) in cases involving other types of gifts or payments. There can be no doubt in

---

[4] Kincaid-Chauncey testified at trial that one of the four cash payments she received was a campaign contribution to pay debts incurred by her son's unsuccessful campaign for city council, but she appealed only the district court's treatment of payments that were *not* contributions. See 556 F.3d at 928, 938, 944 n.16.

this case that petitioners had to "*agree* that the official will take *specific* action in *exchange* for the thing of value," Pet. App. 18a-19a, thus satisfying any specificity requirement that *Ganim* or *Abbey* might imply.[5]

Thus, because the Ninth Circuit agrees with the Eleventh Circuit that an explicit agreement can be inferred from circumstantial evidence, and because the statements by the Second and Sixth Circuits on which petitioners rely are dictum and appear to address a distinct issue, this case presents no conflict that might warrant review by this Court.

b. The court of appeals correctly concluded that the district court was not required to instruct the jury that it could convict only if the government proved an "explicit *quid pro quo*," by which petitioners mean "an actual communication from the official, promising the action in exchange for the contribution," 09-182 Pet. 7, or "articulated commitments, not inferences or implications," Pet. 10. That decision is consistent with this Court's decisions and does not warrant further review.

Petitioners rely entirely on a single word in the Court's opinion in *McCormick*: the reference to a political contribution "made in return for an *explicit* promise

---

[5] Siegelman's amici (Former AGs' Br. 17) also cite *United States* v. *Antico*, 275 F.3d 245, 257 (3d Cir. 2001), cert. denied, 537 U.S. 821 (2002), and *United States* v. *Taylor*, 993 F.2d 382, 385 (4th Cir.), cert. denied, 510 U.S. 891 (1993). *Antico*, like the Second and Sixth Circuit decisions discussed above, did not involve campaign contributions, see 275 F.3d at 249-254, 258, and the court of appeals "echo[ed] the Supreme Court's satisfaction with an implicit *quid pro quo* requirement." *Id.* at 258. In *Taylor*, which did involve campaign contributions, the jury had been instructed that "'[t]here need be no specific *quid pro quo*'" at all, which was erroneous under *McCormick* without regard to the standards by which the government *might* have proved a *quid pro quo*. 993 F.2d at 385.

or undertaking by the official to perform or not to perform an official act." 500 U.S. at 273 (emphasis added). Even read in isolation, that sentence does not address the manner in which an agreement is to be proved at trial. Indeed, in *McCormick* there had been no instruction to find a *quid pro quo* at all, "explicit" or otherwise, *id.* at 274, and the government agreed that if the payments to McCormick were properly regarded as campaign contributions (as the lower court had held they should not be, *id.* at 271-272, 274-275) then proof of a *quid pro quo* would be required. *Id.* at 273. Thus, as the Court has subsequently made clear, *McCormick* does not impose petitioners' desired requirement (Pet. 9) that the *quid pro quo* be proved by "direct evidence."

One year after *McCormick*, this Court elaborated on the *quid pro quo* requirement in *Evans*, *supra*. Evans, a county commissioner, accepted $8000 purportedly as a contribution to his reelection campaign, "knowing that it was intended to ensure that he would vote in favor of the [donor's] rezoning application and that he would try to persuade his fellow commissioners to do likewise." *Id.* at 257. The Court held that Evans's violation of the Hobbs Act was complete when Evans "receive[d] a payment in return for his agreement to perform specific official acts," *id.* at 268; the government did not have to prove that Evans initiated the transaction or that he carried out his part of the *quid pro quo*. *Id.* at 265-268.

Evans had also challenged a jury instruction on the ground that it failed to "properly describe the *quid pro quo* requirement for conviction if the jury found that the payment was a campaign contribution." 504 U.S. at 268. The Court held that the instruction, similar to the one here, "satisfie[d] the *quid pro quo* requirement of *McCormick*." *Ibid.* The instruction provided:

> [I]f a public official demands or accepts money in exchange for [a] specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution.

Id. at 258 (second brackets in original). The Court upheld the instruction because "the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Ibid.*

The court of appeals correctly concluded (Pet. App. 18a-21a) that the bribery instructions comported with *McCormick* and *Evans* by requiring the jury to find that petitioners "agree[d]" that Siegelman would take "specific action" in exchange for the $500,000 contribution from Scrushy. 09-182 Pet. App. 64a. That language materially tracked the instruction approved in *Evans*. By requiring a meeting of the minds covering the specific terms of the exchange, the instruction prevented conviction based on a finding that the $500,000 was given or received with only an *expectation* of future official action by Siegelman benefitting Scrushy—a scenario allowed by the flawed instructions in *McCormick*, 500 U.S. at 261 n.4.[6] As the court of appeals explained, under *Evans*, "[s]ince the agreement is for some specific action or inaction, the agreement must be *explicit*, but there is no

---

[6] In light of the court of appeals' holding that an agreement covering specific action is required, amici's contention (Former AGs' Br. 13) that the standard applied below would permit conviction "whenever [an official] performs an official act and the prosecution presents evidence that he accepted a contribution from a donor who desired that such act take place" is wrong.

requirement that it be *express*." Pet. App. 20a; accord, *e.g.*, *United States* v. *Blandford*, 33 F.3d 685, 696 (6th Cir. 1994) ("Explicit, as explained in *Evans*, speaks not to the form of the agreement between the payor and payee, but to the degree to which the payor and payee were aware of its terms, regardless of whether those terms were articulated."), cert. denied, 514 U.S. 1095 (1995).

The court of appeals was likewise correct in concluding that the jury could rely on circumstantial evidence of an agreement to exchange money for specific official action. See Pet. App. 24a ("Inferring actors' states of mind from the circumstances surrounding their conversation, from their actions, and from their words spoken at the time is precisely the province of the jury."). As Justice Kennedy stated in *Evans*:

> The criminal law in the usual course concerns itself with motives and consequences, not formalities. And the trier of fact is quite capable of deciding the intent with which words were spoken or actions taken as well as the reasonable construction given to them by the official and the payor.

Evans, 504 U.S. at 274 (Kennedy, J., concurring in part and concurring in the judgment); accord *McCormick*, 500 U.S. at 270 ("It goes without saying that matters of intent are for the jury to consider."). In rejecting a vagueness challenge to a statute, this Court recently reaffirmed that "courts and juries every day pass upon knowledge, belief and intent—the state of men's minds—having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred." *United States* v. *Williams*, 128 S. Ct. 1830, 1846 (2008) (quoting

American Commc'ns Ass'n v. *Douds*, 339 U.S. 382, 411 (1950)).

Petitioners' and amici's attempts to distinguish *Evans* (Pet. 11-12; 09-182 Pet. 12-13, 17; Former AGs' Br. 13-14) are unavailing. First, Scrushy incorrectly asserts (Pet. 11) that "*Evans* was not a campaign contribution case." In fact, Evans contended that all of the payments were contributions (even reporting one as such); the instructions required the jury to apply the same standard regardless of whether they were contributions; and this Court assessed the adequacy of the instruction under *McCormick*. See *Evans*, 504 U.S. at 257-258, 267-268; see also *id.* at 278 (Kennedy, J., concurring in part and concurring in the judgment) ("Readers of today's opinion should have little difficulty in understanding that the rationale underlying the Court's holding applies *not only* in campaign contribution cases, but in all § 1951 prosecutions.") (emphasis added).

Nor can petitioners distinguish *Evans* on the theory that the primary question presented was whether an affirmative act of inducement (such as a demand) by a public official is an element of extortion under color of official right. See Pet. 12; 09-182 Pet. 12-13; Former AGs' Br. 14. Evans directly challenged the adequacy of the jury instructions under *McCormick* on the ground that passive acceptance of a campaign contribution based on a specific requested exercise of official power is not a *quid pro quo* unless the official complies or attempts to comply with the request. Pet. Br. at 23, 46-47, *Evans*, *supra* (No. 90-6105). Rejecting that challenge, the Court concluded that the instruction "satisfie[d] the *quid pro quo* requirement of *McCormick*." *Evans*, 504 U.S. at 268. It is doubtful that the Court would have so clearly approved the instruction in *Evans* if, in fact, the

instruction was flawed under the standard announced just one Term earlier in *McCormick*. And, by clarifying that "knowing that the payment was made in return for official acts" is enough," *Evans* "gave content to what the *McCormick quid pro quo* entails." *Blandford*, 33 F.3d at 696.

c. Contrary to the suggestions of petitioners and amici (Pet. 12-13; 09-182 Pet. 19-20; Former AGs' Br. 19-20), the decision below does not "open to prosecution" the ordinary giving and receiving of campaign contributions. *McCormick*, 500 U.S. at 272. The requirement that the official and payor *agree* to exchange a contribution for *specific* action precludes liability from attaching to contributions made and received with only a generalized expectation of future official action; it therefore "defines the forbidden zone of conduct with sufficient clarity." *Id.* at 273; see *Carpenter*, 961 F.2d at 827 ("When a contributor and an official clearly understand the terms of a bargain to exchange official action for money, they have moved beyond 'anticipation' and into an arrangement that the Hobbs Act forbids."). Moreover, as discussed above, a jury is fully capable of determining, based on direct or circumstantial evidence, whether a public official and a payor have entered into an agreement to exchange specific action for a contribution. See, *e.g.*, *Inzunza*, 580 F.3d at 901 ("The circumstances of the promises, including their covert nature, their detail, and the deception in carrying them out, were such that the jury could connect them causally to campaign contributions privately made at or near the same time.").

By contrast, a rule requiring an "express" promise or undertaking between the payor and the official would allow the evasion of criminal liability through "knowing

winks and nods," *Evans*, 504 U.S. at 274 (Kennedy, J., concurring in part and concurring in the judgment), even where (as the jury found here) the parties had a meeting of the minds and agreed to exchange money for official action. See also, *e.g.*, *Carpenter*, 961 F.2d at 827. Under a standard that requires not just a *quid pro quo*, but one that is verbally spelled out with all "i"s dotted and "t"s crossed, all but the most careless public officials will be able to avoid criminal liability for exchanging official action for campaign contributions.

Finally, the facts of this case do not bear out Siegelman's and amici's concerns that without an express *quid pro quo* standard, First Amendment activity will be chilled or arbitrary or unjust prosecutions will result. 09-182 Pet. 19-20; Former AGs' Br. 19-27. The evidence amply proved not only that petitioners (through Hanson) negotiated an agreement to exchange $500,000 in contributions to the lottery campaign for membership on the CON Board, but that they understood and faithfully executed the agreement's terms. See Pet. App. 22a-26a; see also pp. 2-7, *supra*. Petitioners also took steps to conceal their corrupt agreement. For example, Scrushy structured the first $250,000 payment to come from a third party (ultimately, an out-of-state corporation) and hid both payments from the HealthSouth lawyer responsible for political donations, while Siegelman had Bailey deposit the first $250,000 check into a secretly opened bank account (unbeknownst to the lottery fundraising director), and failed to report either payment until the AEF's finances came under scrutiny. See Pet. App. 7a-10a, 25a-26a. Those acts of concealment corroborate the jury's finding that petitioners acted with corrupt intent and knowledge that their conduct was

illegal. See, *e.g.*, *United States* v. *McDowell*, 250 F.3d 1354, 1366-1367 (11th Cir. 2001).[7]

d. Even if this case otherwise warranted review to address the courts of appeals' interpretation of *McCormick*, this case would present a poor vehicle because it would require this Court to decide a threshold question, and to answer that question in a way that no court of appeals has yet done, including the court below. The court of appeals assumed, but did not decide, that *McCormick*'s *quid pro quo* standard, announced under the Hobbs Act's proscription of extortion under color of official right, 18 U.S.C. 1951(a) and (b)(2), applies to prosecutions under the federal-funds bribery and honest-services fraud statutes. See Pet. App. 18a ("[W]hether or not a quid pro quo instruction was legally required, such an instruction was given"); *id.* at 21a ("*assuming* a *quid pro quo* instruction was required in this case, we find no reversible error").

---

[7] Siegelman also challenges (09-182 Pet. 23 n.6) the sufficiency of the *quid pro quo* evidence. This Court ordinarily will not review the fact-bound question whether the evidence was sufficient in a particular case, particularly once that claim has been rejected by both the trial court and the court of appeals. See, *e.g.*, *Hamling* v. *United States*, 418 U.S. 87, 124 (1974). Regardless, the court of appeals correctly held that the evidence was sufficient to prove petitioners' *quid pro quo*. See Pet. App. 22a-26a. Indeed, the care with which the court of appeals undertook its sufficiency review is evidenced by its reversal of two of Siegelman's counts of conviction. See *id.* at 26a-33a. And the court of appeals applied the correct standard of review—"whether the evidence adduced at trial could support any rational determination of guilty beyond a reasonable doubt," *United States* v. *Powell*, 469 U.S. 57, 67 (1984)—contrary to Siegelman's unsupported contention (09-182 Pet. 23 n.6) that the First Amendment requires both reading an explicit *quid pro quo* element into each statute *and* reviewing the sufficiency of proof of that element *de novo*.

Both of the substantive statutes at issue here contain a scienter element different from the Hobbs Act's: federal-funds bribery required proof that petitioners acted "corruptly," 18 U.S.C. 666(a)(1)(B), and honest-services fraud required proof that petitioners acted with the intent to defraud, *i.e.*, "knowingly and with the specific intent to deceive someone," Gov't C.A. Br. 62. No court has specifically addressed whether *McCormick* applies to those statutes. The Ninth Circuit has specifically held that *McCormick* does not apply to a state bribery statute, and it rejected the contention that the First Amendment invariably requires an explicit *quid pro quo* instruction in campaign contribution cases. *United States* v. *Jackson*, 72 F.3d 1370, 1374-1376 (1995), cert. denied, 517 U.S. 1157 (1996); see also, *e.g.*, *United States* v. *Ford*, 435 F.3d 204, 209, 212-213 & n.5 (2d Cir. 2006) (contrasting the mens rea requirements under the federal-funds bribery statute and the Hobbs Act).[8]

At a minimum, *McCormick*'s application to the federal funds bribery and honest-services fraud statutes presents a significant threshold question. The court of appeals properly did not address that question in affirming petitioners' convictions; to win *reversal* based on the

---

[8] Siegelman cites (09-182 Pet. 20 n.4) the Seventh Circuit's observation in *United States* v. *Allen*, 10 F.3d 405 (7th Cir. 1993), that extortion and bribery are "different sides of the same coin." *Id.* at 411. But the Seventh Circuit did not even consider the federal bribery statute, much less decide that *McCormick* controlled its interpretation: the defendant had been charged with a RICO violation with a *state* bribery offense as a predicate act, but he was acquitted, mooting the questions whether Indiana law would apply the same statutory-construction principle as *McCormick* and, if so, whether it would do so in the bribery context. The court of appeals specifically noted that it was not answering those questions. *Id.* at 411-412.

lack of a *quid pro quo* jury instruction, however, petitioners would have to prevail both on the question presented and on the threshold question. And in the absence of any conflict on either question, further review is not warranted.[9]

2. Siegelman contends (09-182 Pet. 23-29) that the evidence was insufficient to support his conviction for obstructing justice because it allegedly did not prove his intent to "hinder, delay, or prevent the communication to a law enforcement officer * * * of information relating to the commission or possible commission of a Federal offense." 18 U.S.C. 1512(b)(3). That fact-bound contention lacks merit.

a. As a preliminary matter, this case stands in an interlocutory posture as to Siegelman.[10] The court of

---

[9] Siegelman cursorily contends (09-182 Pet. 23 n.6) that, even if this Court agrees with the *quid pro quo* standard applied below, it should reverse his convictions "based on due process fairness and notice concerns" because "he could not have known that the law allowed conviction without an actually-stated express *quid pro quo*." See also Law Professors' Br. 14-15. The evidence of concealment, and hence of scienter, factually undermines Siegelman's claim. See, *e.g.*, *Williams*, 128 S. Ct. at 1846 (scienter element refutes claim that statute is indeterminate and vague). Furthermore, to the extent Siegelman now contends that the federal-funds bribery statute is unconstitutionally vague, he failed to preserve any such claim below. See Siegelman C.A. Br. 43-47.

Although the Court is considering a vagueness challenge to the honest-services statute in *Skilling* v. *United States*, cert. granted, No. 08-1394 (Oct. 13, 2009), the petitioner's contention in that case is that a private-gain requirement is necessary to save the statute from unconstitutional vagueness. Because the element of private gain is unquestionably met here, there is no need to hold Siegelman's petition pending the disposition of *Skilling*.

[10] Because the court of appeals affirmed all of Scrushy's convictions, and because both petitioners raise issues concerning *McCormick*, the

appeals reversed Siegelman's conviction on two fraud counts, vacated his sentence, and remanded his case to the district court for resentencing on the remaining five counts. And Siegelman has filed a new-trial motion in the district court attacking his convictions, including the obstruction count. Following the district court's final disposition of the case, petitioner will be able to raise his current obstruction claim—together with any other claims that may arise during resentencing—in a single petition for a writ of certiorari. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam). Review at this time is not warranted.

b. In any event, the court of appeals correctly concluded that the evidence was sufficient to support Siegelman's conviction. That fact-bound determination does not warrant further review. See 09-182 Pet. 28 (conceding that court of appeals' alleged error "was perhaps" not "a conscious disagreement on a reasonably disputable point of law").

The crux of Siegelman's claim in his opening brief on appeal was that the evidence did not prove either that he corruptly "persuaded" Bailey to write the $2973.35 check to Siegelman with the notation "balance due on m/c," or that he engaged in "misleading" conduct toward a third party. See Siegelman C.A. Br. 61-68. Only at the end of, and in connection with, his misleading-conduct argument did Siegelman challenge the evidence proving his intent to hinder, delay, or prevent the communication of information to law enforcement. *Id.* at 68-69; see also *id.* at 25-26 (omitting any contention in summary of

---

interlocutory posture of Siegelman's case does not present an obstacle to this Court's review of the first question presented.

the argument that evidence was insufficient to prove statutory intent element).[11] Rejecting his sufficiency claim, the court of appeals held, first, that "[a] reasonable juror could have concluded that Siegelman persuaded Bailey (he asked and Bailey agreed) to take the final step in the cover up by giving him a $2793.35 [*sic*] check with the notation that it was final payment for the motorcycle." Pet. App. 41a. The court also found sufficient evidence "to support the jury's finding that the delivery of the final check in the presence of the two lawyers and the use of the lawyers to 'finalize' the sale of the motorcycle to Bailey" satisfied the misleading-conduct prong of Section 1512(b)(3), because it proved "an attempt to 'create witnesses as part of a cover-up and to use unwitting third parties or entities to deflect the efforts of law enforcement agents in discovering the truth.'" *Id.* at 43a (quoting *United States* v. *Veal*, 153 F.3d 1233, 1247 (11th Cir. 1998), cert. denied, 526 U.S. 1147 (1999)).[12]

The court's reference to the evidence that Siegelman and Bailey were engaged in a "cover up" and were using third parties "to deflect" the efforts of investigators reflects the court's conclusion that the evidence was suffi-

---

[11] In his reply brief, Siegelman argued in more detail that the evidence did not prove his intent to "hinder, delay, or prevent" communications to law enforcement, but did so almost exclusively in connection with the misleading-conduct prong of the statute. See Siegelman C.A. Reply Br. 30-36 (misleading-conduct argument); *id.* at 28 (corrupt-persuasion argument; summarily contending that there was no evidence of "the intent that the statute proscribes").

[12] Siegelman contends that the evidence was insufficient to prove that he "persuaded" Bailey to write the check or misled Bailey's lawyer, but does not contend that the sufficiency of that evidence independently warrants a grant of certiorari. See 09-182 Pet. 24.

cient to permit the jury to find that Siegelman intended to hinder, delay, or prevent the communication of information about the $9200 payment to law enforcement. The purpose of any cover-up is to frustrate ascertainment of the truth about a crime. And here, the jury heard testimony that Siegelman was aware of the criminal investigation into his dealings with Young when he persuaded Bailey to write the $2973.35 check and that the $2973.35 check was the final step in the plan to make the $9200 payment from Young appear legitimate. Pet. App. 38a-39a. As the court of appeals found, "Siegelman clearly knew that there was a 'possibility' that the federal investigators would come asking." *Id.* at 44a. The jury reasonably could have found that, by creating false exculpatory evidence (the $2973.35 check with the notation "balance due on m/c") and an unwitting alibi witness (Bailey's lawyer), Siegelman intended to hinder, delay, or prevent the communication by Young, Bailey, or Bailey's lawyer of information related to the $9200 payment to investigators.[13] Indeed, Bailey testified that he later lied to investigators about the motorcycle transaction in order "to protect [him]self and [his] boss." *Id.* at 40a-41a.[14]

---

[13] The indictment alleged that Siegelman intended to hinder, delay, and prevent the communication of information by Young, Bailey, and Bailey's lawyer.

[14] Contrary to Siegelman's contention (09-182 Pet. 23), the government did argue on appeal that the evidence supported a finding of intent within the language of the statute. See Gov't C.A. Br. 94-95 ("Siegelman's intent was to hinder, delay, or prevent the communication to law enforcement concerning a potential federal offense because, as Bailey testified, Siegelman was then aware of the federal-state investigation and the $2,973.35 transaction was the final step in the cover-up.").

Siegelman contends that the intent prong of Section 1512(b)(3) is limited to a defendant's "efforts to stop or keep people * * * from providing information to law enforcement, or at least to slow them down," 09-182 Pet. 25, and that the jury allegedly heard no evidence that Bailey or his lawyer would have been willing to provide inculpatory information to law enforcement, *id.* at 26-27. Those arguments are misplaced. First, Siegelman effectively reads the term "hinder" out of Section 1512(b)(3). Whether or not Siegelman believed that Young or Bailey (or Bailey's lawyer, on behalf of Bailey) would have communicated information about the $9200 payment on his own initiative, the jury reasonably could have found that, by engaging with Young and Bailey in a cover-up, Siegelman intended to hinder their communication of information to law enforcement, because the $2973.35 transaction locked in Siegelman's, Bailey's, and Young's cover story about the $9200 payment. Indeed, Siegelman even tried to use the cover-up to his advantage at trial by introducing the bill of sale for the motorcycle. Pet. App. 44a n.25.

Second, even under Siegelman's view of the statute, the jury reasonably could have found that he was aware of the possibility that Young or Bailey might become a cooperating witness—as each one ultimately did—and might (with the support of a lawyer) provide inculpatory information to investigators. See *United States* v. *Romero*, 54 F.3d 56, 62 (2d Cir. 1995) (holding that under Section 1512(a)(1)(C), which criminalizes murder with intent to prevent communication to law enforcement, government need only show defendant's "intent to frustrate the individual's *possible* cooperation with federal authorities"; "victim need not have agreed to cooperate with any federal authority or even to have evinced

an intention or desire to so cooperate") (emphasis added), cert. denied, 517 U.S. 1149 (1996); cf. *Veal*, 153 F.3d at 1251-1252 (requiring only a "*possibility* or *likelihood* that * * * false and misleading information would be transferred to federal authorities").

Finally, with respect to Siegelman's use of an unwitting third party (Bailey's lawyer) as a conduit for the false evidence, the jury reasonably could have found that Siegelman intended to "hinder, delay, or prevent" the lawyer from communicating information about the $9200 payment to law enforcement by giving the lawyer a false understanding of events so that he "would be in a position factually to support the cover up" when investigators came calling. Pet. App. 44a. See *United States* v. *Applewhaite*, 195 F.3d 679, 683, 686-688 (3d Cir. 1999) (upholding Section 1512(b)(3) conviction that was based on attempt to hinder communication to law enforcement by persuading third party who was not involved in underlying crime to provide false alibi); see also *Veal*, 153 F.3d at 1247 (holding that Section 1512(b)(3) covers "activities designed to create witnesses as part of a cover-up and to use unwitting third parties or entities to deflect the efforts of law enforcement"). The court of appeals' fact bound conclusion that the evidence was sufficient to support Siegelman's conviction was correct and does not warrant review.

c. Neither case cited by Siegelman conflicts with the decision below. See 09-182 Pet. 26, 28 (citing *United States* v. *Genao*, 343 F.3d 578 (2d Cir. 2003), and *United States* v. *Hertular*, 562 F.3d 433 (2d Cir. 2009)). In *Genao*, the court stated that Section 1512(b)(3) "requires a specific intent to interfere with the communication of information," and it held that the indictment was deficient for failing to allege "why [the defendant] lied

to the investigators." 343 F.3d at 586. Here, the indictment (which Siegelman does not challenge) tied the statutory intent element to the $9200 payment, and the evidence proved Siegelman's intent as alleged. In *Hertular*, the court found sufficient evidence to support the defendant's conviction under Section 1512(b)(3) because it proved his "specific intent * * * to hinder or prevent not simply the filing of an indictment but any communication to or among federal law enforcement officials that could lead to his indictment." 562 F.3d at 433. The same conclusion applies here. Siegelman's intent was not generally to avoid indictment for the $9200 payment from Young; the purpose of creating false evidence and an alibi witness was to hinder, delay, or prevent the communication of *any* incriminating information if "the federal investigators [came] asking." Pet. App. 44a. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
LANNY A. BREUER
Assistant Attorney General
JOHN-ALEX ROMANO
Attorney

NOVEMBER 2009

REPLY BRIEF

Supreme Court, U.S.
FILED
NOV 2 3 2009
OFFICE OF THE CLERK

No. 09-167

In The
Supreme Court of the United States

RICHARD M. SCRUSHY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER ON CERTIORARI

JAMES K. JENKINS
MALOY JENKINS PARKER
75 Fourteenth Street, NW
25th Floor
Atlanta, GA 30309
(404) 875-2700

BRUCE S. ROGOW
Counsel of Record
BRUCE S. ROGOW, P.A.
500 East Broward Blvd., Suite 1930
Fort Lauderdale, FL 33394
(954) 767-8909

Counsel for Petitioner

ARGUMENT

The government's Brief in Opposition actually lends support to Scrushy's arguments. Scrushy asserted two reasons for granting certiorari: (1) conflict with *McCormick* and *Evans* and what proof they require, and (2) confusion and conflict about the impact of *Evans* on *McCormick's* "explicit promise" requirement.

The government plays down the importance of *McCormick's* use of "explicit," saying we rely "on a single word . . . : the reference to a political contribution made in return for an *explicit* promise or undertaking by the official . . . ." Then the government says "[e]ven read in isolation, that sentence does not address the manner in which an agreement is to be proved at trial." Br. in Opp. 17-18 (emphasis added by government). But "explicit" was not isolated; the Court emphasized the "formulation *defines* the forbidden zone of conduct with sufficient clarity." 500 U.S. at 273 (emphasis supplied). And it approvingly quoted the *United States v. Dozier*, 672 F.2d 531, 537 (5th Cir. 1982) definition: "a public official may not *demand* payment as inducement *for the promise* to perform (or not to perform) an official act."' *Id.* (emphasis supplied). "Define," "demand," "promise" lend credence to the notion that the court meant something specific and important when it spoke of the "formulation." How something is proved (and what instruction is required) is a different inquiry, but it is an inquiry that must be informed by a clear understanding of the essence of the proof required to meet explicit, demand and promise. That is a task for this Court.

What does "explicit" mean and what kind of jury instruction keeps faith with the Court's construct? The government tries to finesse the questions with the argument that *Evans* watered down *McCormick*, and that *United States v. Blandford*, 33 F.3d 685, 696 (6th Cir. 1994) had it right: "*Evans* 'gave content to what the *McCormick quid pro quo* entails.'" Br. in Opp. 22. However, the government's reliance on *Blandford* should have included *Blandford's* doubts: "Exactly what effect *Evans* had on *McCormick* is not altogether clear." 33 F.3d at 695. And a hint of doubt is present in the government's submission: "It is doubtful that the Court would have so clearly approved the instruction in *Evans* if, in fact, the instruction was flawed under . . . *McCormick*. Br. in Opp. 21-22.

Why guess? Why not have the question resolved so that the courts of appeals need not struggle to reconcile *McCormick* and *Evans*. The government takes nearly ten pages to try to persuade the Court that there is no conflict with *McCormick* and no threat to the First Amendment (Br. in Opp. 14-24). But the court below recognized that the "potential negative impact of [the statutes used] on issue advocacy campaigns is even more dangerous than it is to candidate-election campaigns." And the court agreed "that this is the first case to be based upon issue-advocacy campaign contributions." Pet. App. 15a, n.13. There can be no doubt about the importance of the issue; the court below said because Scrushy's donation to an education lottery fund gave rise to his convictions, "they impact the First Amendment's core values – protection of free political speech and the right to support issues of great public importance." Pet. App. 14a-15a. Resolving the issue now is preferable to having the issue percolate through the lower courts while citizens contribute to issue-advocacy campaigns and run the risk of prosecution if

appointed to some post by an appreciative elected official.

One would think that if the mechanics of *McCormick* and interplay with *Evans* were so easily understood, the government would not need to work so hard, and the courts of appeals would not have had to work so hard, to fashion the proper formula for reconciling "explicit" with the means to prove it and the jury instructions to convey it. As our Petition showed, the courts of appeals have struggled with the subject. Pet. 13-17. The government's Brief, while striving to portray a consensus on the *McCormick/Evans* meaning, confirms the fact that the courts of appeals have not had an easy time with the matter.

Finally, the government recognizes that "*McCormick's* application to the federal funds bribery and honest services fraud statutes presents a significant threshold question. "Br. in Opp. 25-26.

The government concedes that no court has addressed whether the *McCormick* Hobbs Act formulation applies to the bribery/honest services statutes used here (*id.* at 24-25), but seeks to avoid this Court's inquiry despite the court of appeals' assumption that *McCormick* did apply. That approach is insensitive to the First Amendment "core values" involved (Pet. App. 15a); insensitive to the need to avoid more confusion and conflict in the courts of appeals; and insensitive to the concept of complete judicial review. Since the court of appeals assumed *McCormick* applied here, and since that is an important but unanswered question that is the heart of this case, the Court should grant review to determine if Richard Scrushy's convictions (and Governor Siegelman's) were consistent with *McCormick's* mandate.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JAMES K. JENKINS
MALOY JENKINS PARKER
75 Fourteenth Street, NW
25th Floor
Atlanta, GA 30309
(404) 875-2700

BRUCE ROGOW
Counsel of Record
BRUCE S. ROGOW, P.A.
500 East Broward Blvd.,
Suite 1930
Fort Lauderdale, FL 33394
(954) 767-8909